Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JACK C. SMITH,

Petitioner,

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether notice of entry of judgment given to local counsel, but not to lead counsel, within 21 days of its entry, precludes the district court from reopening the time for appeal under Rule 4(a)(6) when lead counsel does not receive actual notice until after the time for appeal under Rule 4(a)(1) has expired.

2. Whether, when plaintiff's failure to file a timely notice of appeal occurred before the effective date of new Rule 4(a)(6) of the Federal Rules of Appellate Procedure but plaintiff submitted his motion to reopen the time for filing a notice of appeal under Rule 4(a)(6) after the effective date plaintiff's motion should be decided under the new Rule 4(a)(6).

3. Whether a district court may vacate and reenter a judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure to extend the time for filing a notice of appeal, when counsel did not timely file a notice of appeal because of excusable neglect, which arose during the period for filing a notice of appeal.

4. Whether an appellate court may deny a Rule 60(b)(1) motion to vacate and reenter judgment so as to extend the time for filing a notice of appeal on the grounds that the actions of plaintiff's lead counsel did not constitute excusable neglect because they had received constructive notice of entry of judgment and did not exhibit due diligence in inquiring whether entry of judgment had occurred.

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Jack Smith respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

None of the opinions in this case are reported. The January 27, 1994, memorandum opinion of the Court of Appeals for the Ninth Circuit, which is the subject of this petition, appears in the Appendix here ("Pet. App. A,") at 5a. The April 22, 1992, Order of the district court denying plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal or, Alternatively, to Vacate and Reenter the Judgment appears in the Appendix at 12a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion affirming the district court's judgment against the petitioner on January 27, 1994. The Supreme Court has jurisdiction to review the judgment below under 28 U.S.C. 1254(1).

RULES OF PROCEDURE INVOLVED IN THE CASE

The following rules, which are set forth in the Appendix to this petition at 1a, are involved in this case: Rule 4(a) of the Federal Rules of Appellate Procedure, Rule 60(b) of the Federal Rules of Civil Procedure, and Rule 77(d) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In January 1968, defendant hired plaintiff as a distribution clerk in the Concord, California, Post Office. Magistrate's Findings of Fact, Conclusions of Law, and Recommendations, June 21, 1985 (attached in the Appendix at 20a), Finding of Fact 1 (hereafter "FF"). During the course of his employment, plaintiff had five back operations. FF 4-9.

Following the fifth surgery in 1984, plaintiff returned to work on temporary light duty status. FF 12. The limitations imposed by Dr. Charles W. Barnes, plaintiff's treating physician, were: "[T]he patient can stand, sit 6-8 hours a day though with several breaks, more for changing position. He should avoid heavier lifting, keeping lifting to 10-15 pounds, and that not on a frequent basis. Repetitive bending as well as twisting should be avoided." FF 13. In September 1984, Dr. Willie L. Wilson, a Postal Service

Medical Officer, gave plaintiff medical clearance to return to work under essentially the same limitations as those set by Dr. Barnes. FF 14.

While on light duty status, plaintiff would sort bundles of local bulk mail, which weighed about one pound, from a tub at the end of a case. FF 22. Plaintiff also would sort first class mail which the supervisor or another distribution clerk would carry to plaintiff's case in a tray. FF 23. Plaintiff could not perform duties performed by some of the other distribution clerks as a result of his weight limitations and stooping and bending restrictions. FF 22, 23, 25. However, it would have been unlikely that a distribution clerk with plaintiff's seniority would have been asked to perform many of those duties, such as unloading trucks, distributing parcels, or breaking down mail. FF 25. Plaintiff's supervisors and the President of the American Postal Workers Union local in Concord considered plaintiff to be of average or above average proficiency in mail distribution. FF 27.

In February 1985, defendant ordered plaintiff to submit to a Fitness-for-Duty examination. FF 29. Dr. Wilson, who performed the examination, concluded that plaintiff was not fit to return to full duty status and therefore that the work limitations should remain unchanged. *Ibid.*

William A. Helm, the postmaster of the Concord Post Office, terminated plaintiff's light duty authorization in the spring of 1985. FF 31-32. On June 11, 1985, Supervisor Fred Blackburn wrote to plaintiff informing him that he

would be separated from the Postal Service. FF 36; Pl. Ex. 24.[1]

On June 21, 1985, plaintiff filed an administrative discrimination complaint. On June 27, 1985, Postmaster Helm sent plaintiff a letter of decision informing plaintiff that he was terminated as of July 1985. *Ibid.*

On July 29, 1986, plaintiff filed suit against defendant under the Rehabilitation Act. The district court had subject matter jurisdiction pursuant to 42 U.S.C. 2000e-5(f)(3), 42 U.S.C. 2000e-16(c) and (d), and 29 U.S.C. 794(a)(1), which give jurisdiction to the district courts over suits by federal employees involving complaints of handicap discrimination, and under 28 U.S.C. 1331, which gives jurisdiction to the district courts over cases involving federal questions. Since 180 days had passed from the time plaintiff filed his administrative complaint of discrimination with defendant, plaintiff had exhausted his administrative remedies with respect to the claims raised in the complaint to the extent required by 42 U.S.C. 2000e-16(c).

On September 20, 1985, the Magistrate issued proposed Findings of Fact, Conclusions of Law, and Recommendations, which were adverse to the plaintiff.[2] On

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[1] The Plaintiff's Exhibits referred to in the Statement of the Case were submitted by plaintiff to the district court.

[2] In response to the Magistrate's findings, plaintiff requested permission to exceed the page limit for his memorandum containing objections, accompanying this motion with his objections. The district court denied the motion. Plaintiff then requested permission to file a shortened version of the objections, accompanying the motion with the shortened objections. On November 29, 1989, the district court adopted, without opinion and without considering plaintiff's objections, the

July 18, 1991, the district court issued an Order adopting the Magistrate's Findings of Fact and Conclusions of Law and directing that judgment be entered against the plaintiff. The district court adopted the Magistrate's ruling that, notwithstanding the Postal Service's own Fitness-for-Duty examination concluding that plaintiff was fit for light duty work, the Post Office had substantial basis to find that plaintiff posed a reasonable probability of substantial harm to himself or others.

The district court's order was never sent to any of plaintiff's counsel. CR 199, Affidavit of Susan J. McGolrick (hereafter "McGolrick Aff."), paras. 3, 7; CR 198, Affidavit of Tracey Cole-Hailey (hereafter "Cole-Hailey Aff."), paras. 2-5.[3] The judgment was entered on July 19, 1991, but was sent only to the office of plaintiff's local counsel, James E. Eggleston. CR 199, McGolrick Aff., paras. 3, 7; CR 198, Cole-Hailey Aff., paras. 2-5; CR 201, Affidavit of James E. Eggleston (hereafter "Eggleston Aff."), para. 3. Neither Mr. Eggleston nor anyone in his office contacted plaintiff's primary counsel, Terris, Pravlik & Wagner, or plaintiff himself, to inform them about the entry of judgment. *Id.*, paras. 2-3; CR 199, McGolrick Aff., para. 7. Plaintiff's primary counsel did not become aware that the court had decided to adopt the Magistrate's

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Magistrate's recommended Findings of Fact, Conclusions of Law, and Recommendations, and entered a judgment dismissing plaintiff's action. On December 4, 1989, the district court denied, again without opinion, plaintiff's motion to file its shortened objections. On appeal, on January 9, 1991, the Court of Appeals for the Ninth Circuit reversed and remanded, directing the district court to allow plaintiff to file objections which conformed to the page limitation.

[3] Affidavits given "CR" numbers were submitted to the court of appeals in plaintiff's October 2, 1992, "Excerpts of Record."

findings and conclusions until January 2, 1992, when defendant's counsel contacted plaintiff's counsel regarding a related matter and happened to refer to the decision. *Id.*, para. 4.

Mr. Eggleston's office did not forward the judgment to plaintiff's primary counsel because all previous communications from the court had been sent to primary counsel as well as to local counsel.[4] CR 197, Affidavit of

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[4] The following documents were sent by the district court to plaintiff's primary counsel:

Document Number	Description of Document
1.	2/3/87, Order, re: status conference
2.	2/27/87, Order, re: transfer of case
3.	3/2/87, Notice of Continuance
4.	6/8/87, Order, re: pre-trial preparation
5.	11/2/87, Order, re: Local Rule 228
6.	12/16/87, Order, re: defendant's motion to transfer intradistrict venue to San Francisco
7.	12/30/87, Reassignment Order
8.	3/10/88, Scheduling Order, re: pre-trial proceedings and trial date
9.	4/8/88, Notice of Settlement Conference
10.	10/14/88, Notice of Further Settlement Conference
11.	12/8/88, Order, re: plaintiff's motion for partial summary judgment
12.	3/14/89, Order of Reference
13.	5/3/89, Notice of Status Conference
14.	5/24/89, Order, re: starting date of trial, availability of Dr. Wilson, dates for filing lists of exhibits and witnesses
15.	6/29/89, Order, re: production of documents
16.	7/24/89, Order, re: discovery
17.	7/26/89, Order, re: telephone conference
18.	8/22/89, Order, re: plaintiff's motion for leave to file memorandum in excess of page limitation

Laraine L. Laudati (hereafter "Laudati Aff."), paras. 5-6; CR 199, McGolrick Aff., para. 8; CR 201, Eggleston Aff., para. 4. The court was aware that Mr. Eggleston had no substantive involvement in representing plaintiff in this case since he had never appeared in court. CR 197, Laudati Aff., para. 5; CR 201, Eggleston Aff., para. 2.

Upon learning of the July 19, 1991, entry of judgment, plaintiff's primary counsel immediately filed, on January 7, 1992, a motion to reopen the time for filing a notice of appeal or to vacate and reenter the judgment. CR 199,

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19. 9/19/89, Recommendations Re Defendant's Motion for Additional Sanctions Including Dismissal
20. 9/20/89, Magistrate's Findings of Fact, Conclusions of Law and Recommendations
21. 10/30/89, Stipulation and Order Enlarging Time within which Plaintiff Must File Objections to Magistrate's Recommendations
22. 10/30/89, Order, Plaintiff's Objections to the Magistrate's Recommendations re Defendant's Motion for Additional Sanctions Including Dismissal, re: plaintiff's motion to exceed page limitation
23. 10/30/89, Order, Plaintiff's Objections to the Magistrate's Findings of Fact, Conclusions of Law, and Recommendations, re: plaintiff's motion to exceed page limitation
24. 11/29/89, Order, re: adoption of Magistrate's recommendations
25. 11/29/89, Judgment
26. 12/4/89, Order, re: plaintiff's motion for leave to file objections to Magistrate's recommendations
27. 12/4/89, Order, re: plaintiff's motion for leave to file objections to Magistrate's findings and conclusions
28. 1/31/90, Order Awarding Sanctions
29. 6/4/91, Stipulation and Order Extending Briefing Schedule for Plaintiff's Objections to Magistrate's Recommendations

McGolrick Aff., para. 11. The district court denied plaintiff's motion on April 22, 1992.

The district court declined to use Rule 4(a)(6) of the Federal Rules of Appellate Procedure to grant plaintiff's motion on two grounds. First, the court doubted the rule could be applied retroactively, since the rule did not become effective until December 1, 1991, at which point plaintiff's time for appeal under Rule 4(a)(1) had already expired. Pet. App. A, p. 15a. Assuming Rule 4(a)(6) did apply, the court found that the notice to plaintiff's local counsel prevented plaintiff from taking advantage of its provisions. *Id.* at 16a. The district court denied plaintiff relief under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the notice given to plaintiff's local counsel prevented plaintiff from satisfying the test for a Rule 60(b)(1) extension of time to file a notice of appeal enunciated in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983)(en banc), which requires that movant not have received notice of entry of judgment. In addition, the district court found that plaintiff's counsel had not demonstrated the due diligence required by *Rodgers v. Watt*. Pet. App. A, p. 18a. Finally, the district court rejected relief under Rule 60(b)(6), because plaintiff did not demonstrate "extraordinary circumstances." *Id.* at 18a.

Plaintiff timely filed a Notice of Appeal on June 16, 1992. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 42 U.S.C. 2000e-5(j).

The court of appeals affirmed the district court. It did not reach the issue of whether Rule 4(a)(6) applied in this case, but simply affirmed the district court's finding that plaintiff could not take advantage of that rule, if it did apply, since local counsel had received notice. Pet. App. A, p. 8a. The court of appeals also affirmed the district court's ruling

that relief under Rule 60(b) could not be granted. The court of appeals rested its holding primarily on the ground that *Rodgers v. Watt* makes Rule 60(b)(1) relief unavailable in situations where the excusable neglect which gives rise to the Rule 60(b) motion arose during the 60-day period for filing a notice of appeal under Rule 4(a) and plaintiff's local counsel received notice of entry of judgment during that period. *Id.*, p. 9a. In the alternative, the court of appeals held that plaintiff's late filing was not caused by "excusable neglect," as defined by *Rodgers v. Watt*, because plaintiff's local counsel had received notice of entry of judgment and plaintiff's lead counsel had failed to demonstrate due diligence because she did not ask the district court clerk whether judgment had been entered over a six-month period. *Id.*, p. 10a, n. 3. Finally, the court of appeals affirmed the district court's ruling refusing Rule 60(b)(6) relief. *Id.*, p. 10a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case comes to the Court as another chapter in the long history of attempts by the judicial system to reconcile the importance of deciding cases on the merits with the value of reliance on the finality of decisions. Despite recent rules changes which were intended to alter the harsh results of the past by placing more emphasis on deciding cases on the merits, the court of appeals persisted in applying its old analysis which imposed a strict duty of due diligence on plaintiff to monitor the district court's docket so as to ascertain that judgment has been entered before the time for appeal has expired. In indicating that plaintiff's counsel had not committed "excusable neglect" under Rule 60(b)(1) of the Federal Rules of Civil Procedure, the court of appeals

stated that "the lack of due diligence by lead counsel who failed to inquire for six months, would count against Smith."[5] Pet. App. A, p. 10a, n. 3. This duty to inquire repeatedly of the clerk about entry of judgment is inconsistent with the changes wrought by the 1991 amendments to the Federal Rules.

Prior to the 1991 amendments, more than one court had lamented the unfair strictures it believed that the rules imposed when counsel had not received notice. For example, in 1975, Judge Wisdom, writing for the court in *Fidelity and Deposit Company of Maryland v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 749 (5th Cir. 1975) *certiorari denied*, 425 U.S. 950 (1976), observed that:

> The potential hardship to parties whose counsel, through inadvertence or lack of diligence, failed to learn of the entry of judgments is apparent. Less apparent is whether the benefit of enhanced finality outweighs these cases of hardship, and the burden on all concerned with respect to the periodic inquiries the amended rule implicitly contemplates.

In 1985, in *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3rd Cir. 1985), Judge Higginbotham wrote separately to emphasize the unfairness of the rules as they then appeared. In his opinion, "the current law on this issue seems totally inconsistent with basic concepts of justice and fairness." *Id.* at 46. He repeated what all litigators know (*ibid.*):

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[5] In fact, lead counsel's Rule 4(a)(6) motion was lodged within the 180-day time limit.

> [T]he doctrine that lack of notice of a final judgment cannot affect the running of the time for appeal makes practically no sense in light of the way the real world actually functions. We have created a ludicrous situation where the only way a litigant can protect himself would be to check all of the dockets of the court and make inquiries daily, and even then must rely, at his or her own peril, on information that may itself be erroneous.

In *Polyok Corp. v. Manning*, 793 F.2d 1318, 1321 (D.C. Cir. 1986), Judge Mikva recognized that the combination of Rule 4 of the Federal Rules of Appellate Procedure and Rule 77(d) of the Federal Rules of Civil Procedure:

> may produce harsh results in cases where the losing party, through no fault of its own, simply does not receive notice of the judgment until the time for filing an appeal has expired. We also acknowledge that the problems occasioned by non-receipt of notice cannot be eliminated simply by charging litigants to follow the progress of pending cases more carefully. If the party does not receive proper notice, it is no easy matter to find out that the case under submission has been decided. Reading the local legal newspaper, for example, is insufficient in jurisdictions where the newspaper does not provide a complete, daily listing of all dispositive orders or judgments entered in district court cases. Nor can this court cavalierly require the parties to make inquiries with the clerk's office every twenty-nine days, so that the losing party may file a timely notice of appeal from even those dispositive orders that were entered immediately after the party's

> previous inquiry. Such an order would impose an onerous task upon litigants to make periodic inquiries of the clerk's office in every court in which they have a case under submission, and would unduly burden the clerk's offices.

In 1991, pursuant to this Court's order, Rule 4(a) of the Federal Rules of Appellate Procedure and Rule 77(d) of the Federal Rules of Civil Procedure were amended to address the problem of failure to receive notice of entry of judgment. The newly added Rule 4(a)(6) provides that:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

The Notes of the Advisory Committee explain that this new clause provides a limited opportunity for a party who does not receive notice of entry of judgment pursuant to Rule of Civil Procedure 77(d) to file a timely appeal. At the same time, Rule 77(d) was amended to be consistent with the amended Rule 4. The Notes of the Advisory Committee accompanying that amendment explain that:

> This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions

now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment.

* * *

Failure to receive notice may have increased in frequency with the growth in caseload in the clerk's offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court, as well as counsel.

* * *

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice.

Thus, the 1991 Amendments to the Federal Rules impose on prevailing parties, not losing parties, the duty to assure that notice is received. More broadly, the Amendments emphasize more than previously the importance of deciding cases on their merits. In contrast, the court of appeals in this case exalted finality in a series of rulings which violate the Rules, are in conflict with decisions of other circuits, and which were plainly inequitable.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AS TO WHETHER NOTICE TO LOCAL COUNSEL IS IMPUTABLE TO LEAD COUNSEL WHEN LOCAL COUNSEL FAILS TO COMMUNICATE THE NOTICE

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that if "a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry" and a motion is filed within 180 days of the entry of judgment, the court may reopen the time for appeal for 14 days. That provision went into effect on December 1, 1991, after plaintiff's time for appeal had expired but before plaintiff's primary counsel received the appealable judgment. The court of appeals declined to decide whether Rule 4(a)(6) applied, concluding that plaintiff could not obtain relief even if it did. It held that, since plaintiff's local counsel had received notice, plaintiff had received constructive notice sufficient to disqualify him from the benefits of Rule 4(a)(6). Pet. App. A, p. 9a. This holding conflicts with the law of other circuits.

In this case, the district court's order was not sent to any of plaintiff's counsel. The judgment was sent to plaintiff's local counsel who had not been actively involved in the case. Because of the court's practice of mailing all its orders to plaintiff's lead counsel, local counsel did not even perform the routine function of notifying lead counsel when court orders were entered.

The court of appeals held that "[w]here a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment," even when the only

counsel that is actively involved in managing the case does not receive notice. Pet. App. A, p. 8a. The court relied on *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986). *Alaska Limestone* stated that a party must show "unique circumstances" to obtain an extension of time to appeal, even under the "excusable neglect" standard in Rule 4(a)(5) and that a miscommunication between counsel is not a "unique circumstance." *Id.* at 1411-1412. It stated further that "[i]nadvertence or mistake of counsel * * * does not constitute excusable neglect." *Id.* at 1411. This conclusion formed the basis of *Alaska Limestone's* holding that notice to local counsel is always sufficient notice.[6]

Plaintiff has been unable to discover any case which decides the same issue under Rule 4(a)(6) as to whether the time for appeal may be extended where only local counsel have been notified of the entry of judgment. However, courts have addressed this issue in deciding motions to extend the time for appeal under Rule 4(a)(5) and under Rule 60(b) of the Federal Rules of Civil Procedure. Although those rules do not have the same notice requirement as Rule 4(a)(6), the decisions are directly on point because they rule on the issue of whether the time for appeal may be extended under the "excusable neglect" standard when only local counsel received notice. The *Alaska Limestone* case, on which the court of appeals relied, is a case decided under the "excusable neglect" standard.

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[6] Thus, in refusing to apply Rule 4(a)(6), the court of appeals relied on a holding about sufficiency of notice which in turn relied on an interpretation of "excusable neglect" which is contrary to this Court's interpretation of that term in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993). See pp. 23-27 below.

Some circuits have agreed with the Ninth Circuit and imposed a strict standard in cases where notice of appeal was filed late because of a failure by local counsel to notify lead counsel of judgment. See *Lord v. Helmandollar*, 348 F.2d 780, 782 (D.C. Cir. 1965), certiorari denied, 383 U.S. 928 (1966)(where local counsel received notice of a judgment but lead counsel did not, time for filing notice of appeal was not extended); *Pasquale v. Finch*, 418 F.2d 627, 630 (1st Cir. 1969)(where United States Attorney, government's counsel of record, received notice of judgment and mailed the notice to the Justice Department, which misplaced the notice for two months, time for filing notice of appeal was not extended); *Borowski v. DePuy, Inc.*, 876 F.2d 1339, 1341 (7th Cir. 1989)(where local counsel failed to forward magistrate's report to chief counsel, no "excusable neglect" under Rule 60(b)(1)); *Gooch v. Skelly Oil Co.*, 493 F.2d 366, 370 (10th Cir. 1974)(where one counsel of record received notice of judgment but chief counsel did not, situation did not rise to "unique and extraordinary circumstances" standard required for a finding of excusable neglect to extend time for appeal under Rule 4).

On the other hand, other circuits have concluded that miscommunication between local counsel or other counsel of record and lead counsel is sufficient grounds to grant a motion to extend the time for notice of appeal. See, *e.g.*, *Babich v. Clower,* 528 F.2d 293 (4th Cir. 1975)(where appellant's local counsel, but not appellant's lead counsel, received notice of judgment, court held that lead counsel's failure to learn of judgment was excusable neglect under Rule 4(a)(5)); *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983)(*Babich v. Clower* cited as a good example of when failure to receive notice of judgment warrants an extension of the time to appeal). See also *Resnick v. Lehigh Valley R. Co.*, 11 F.R.D. 76, 77

(S.D.N.Y. 1951)(time to file notice of appeal under Rule 73(a) of the Federal Rules of Civil Procedure, now Rule 4(a) of the Federal Rules of Appellate Procedure, extended when plaintiff's trial counsel, who was in active charge of the case, failed to receive timely notice of judgment, although plaintiff's attorney of record did receive timely notice).

In sum, a conflict exists among the circuits as to whether, when local counsel receives notice of entry of judgment but fails to communicate the notice to lead counsel, notice of entry of judgment is imputable to lead counsel for purposes of extending the time for notice of appeal.

II. THERE IS A CONFLICT AMONG THE CIRCUITS WHETHER NEWLY ENACTED RULE 4(a)(6) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPLIES TO CASES IN WHICH THE TIME FOR FILING NOTICE OF APPEAL UNDER RULE 4(a)(1) EXPIRED BEFORE RULE 4(a)(6) BECAME EFFECTIVE

The court of appeals declined to decide whether the newly adopted Rule 4(a)(6) of the Federal Rules of Appellate Procedure applied because, as we have seen above, it found that the Rule would not provide relief in any event. Pet. App. A, p. 8a. In order to reach the question presented in Section I of this petition, whether notice given to local counsel but not lead counsel within 21 days of entry of judgment precludes the district court from granting relief under the Rule, this Court must first decide whether the Rule applies. Accordingly, the conflict among circuits on that issue is discussed below.

In its order promulgating the 1991 amendments to the Federal Rules of Appellate Procedure, this Court directed

(Amendments to Federal Rules of Appellate Procedure, interim volume 111 S. Ct. 1011 (1991)):

> That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

The district court entered judgment in this case on July 18, 1991. Lead counsel did not receive notice of entry of judgment until January 2, 1992, after the effective date of the amended rules. Plaintiff promptly moved on January 7, 1992, to reopen the time for filing notice of appeal, under Rule 4(a)(6) of the Federal Rules of Appellate Procedure and Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. Hence, this case was pending in the district court before the amended rules became effective, but the motion to reopen the time for appeal was made after Rule 4(a)(6) became effective. Plaintiff's motion to reopen was made within the 180-day period provided for in Rule 4(a)(6). Nevertheless, the district court refused to apply the new rules (Pet. App. A, p. 15a) and the court of appeals declined to reverse (Pet. App. A, p. 9a).[7]

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[7] This failure to apply the new rules was inconsistent with this Court's directive to apply the new rules, insofar as just and practicable, in pending appellate cases. Amendments to Federal Rules of Appellate Procedure, *supra*, interim volume 111 S. Ct. at 1011. In view of the holding of this Court in *Pioneer* to apply liberally the concept of "excusable neglect" (113 S. Ct. at 1497) and the policy behind the 1991 amendment to Rule 4 to allow a party that did not receive notice from the court clerk a 180-day grace period in which to move to reopen the time for appeal, it would be unjust to refuse to apply Rule 4(a)(6) in this case. See pp. 9-14, above.

One other court has considered in a published opinion the question whether to apply the 1991 amendments to a motion to extend time to file a notice of appeal, when the case was pending before the amendments came into effect. In *In re Jones*, 970 F.2d 36 (5th Cir. 1992), the appellants filed a Rule 60(b)(6) motion to extend the time for notice of appeal, and the appellees responded, before the new Rule 4(a)(6) became effective. Thus, as in the instant case, the time for filing a notice of appeal under Rule 4(a)(1) had passed before the new rule became effective. Unlike the present case, the motion to extend the time for filing a notice was also filed before the new rule became effective. *Id.* at 38. Nonetheless, citing "the general rule that courts apply procedural rules as they exist at the time of the decision, as long as no manifest injustice results," the Fifth Circuit applied the new version of Rule 4(a). *Ibid.*

On the other hand, in unpublished opinions, the Tenth Circuit came to the same result as the district court in this case. *See Gamble v. United States*, 989 F.2d 507 (Table), 1993 WL 55958 (10th Cir. 1993); *Payton v. Spruiell*, 951 F.2d 1260, 1992 WL 2886 (10th Cir. 1992). On November 29, 1993, the Tenth Circuit suspended its Local Rule 36.3 which provided that unpublished opinions had no precedential value. The unpublished opinions are prefaced with the notice that "citation of unpublished opinions remains unfavored."

Thus, a conflict exists between the Fifth and Tenth Circuits on this issue. Petitioner submits that *In re Jones* was correctly decided and Rule 4(a)(6) of the Federal Rules of Appellate Procedure applies to this case.

III. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF OTHER CIRCUITS AS TO THE APPLICABILITY OF RULE 60(b)(1) IN CASES WHERE IT IS INVOKED TO EXTEND THE TIME FOR APPEAL

The court of appeals held that, under *Rodgers v. Watt*, *supra*, relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure is unavailable where the excusable neglect which gives rise to a Rule 60(b)(1) motion arose during the period for filing a notice of appeal under Rule 4(a)(1)(or the period for requesting an extension under Rule 4(a)(5)). Pet. App. A, p. 9a. The court of appeals applied this requirement to mean that if counsel, save for excusable neglect, should have been aware of entry of judgment during that the 60-day period, Rule 60(b) is not available. *Ibid.*

The Ninth Circuit's approach conflicts with that adopted by most of the circuits in order to address the seemingly competing requirements of Rule 4 and Rule 60. Most circuits have concluded that out of respect for the time limits imposed by Rule 4(a) for the filing of notices of appeal, a more stringent test must govern petitions for relief to extend the time for appeal under Rule 60(b) than for other types of Rule 60(b) motions, such as motions to vacate a default judgment. The more stringent test required the movant to demonstrate some evidence of due diligence, rather than mere excusable negligence.[8] However, none of these

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[8] This due diligence requirement itself represents an evolution in the continuing attempt by courts to reconcile the requirements of Rule 4 of the Federal Rules of Appellate Procedure and Rule 60 of the Federal Rules of Civil Procedure. In 1946, Rule 77(d) of the Federal Rules of Civil Procedure was amended, in the wake of this Court's opinion in *Hill v. Hawes*, 320 U.S. 520 (1944)(upholding the district courts' discretion

circuits went beyond use of a due diligence requirement to impose a requirement concerning when the excusable neglect

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to extend the time for appeal if the court clerk failed to serve notice of entry of judgment) to provide that lack of notice of entry of judgment did not affect the time to appeal, except as permitted in Rule 73(a). See *Rodgers v. Watt, supra*, 722 F.2d at 458; *Lord v. Helmandollar, supra*, 348 F.2d at 782. At the same time, Rule 73(a)(now Rule 4(a) of the Federal Rules of Appellate Procedure) was amended to give litigants an escape hatch -- the time for filing a notice of appeal could be extended upon a showing of excusable neglect if a motion was filed within 30 days after expiration of the time for appeal under Rule 4(a)(1). *Rodgers v. Watt, supra*, 722 F.2d at 458. Rule 4(a)(5) appeared to overlap with Rule 60(b)(1) by allowing a 30-day extension in cases of excusable neglect. Mindful of the adverse reaction to *Hill v. Hawes*, courts initially simply refused to grant Rule 60(b) motions for the extension of time to appeal. See *West v. Keve*, 721 F.2d 91, 96-97 (3rd Cir. 1983); *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 124, n. 31 (D.C. Cir. 1972). Gradually, however, courts evolved a standard which was meant to respect the application of Rule 4, yet at the same time allow the use of Rule 60 to correct the unfairness inherent in punishing a litigant for failure to file a timely appeal when he does not receive notice of entry of judgment.

arises.[9] Only the Ninth Circuit (and perhaps the Tenth

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[9] See, *e.g.*, *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 500 F.2d 808, 810 (D.C. Cir. 1974)(per curiam)(if neither party received actual notice, prevailing party not prejudiced, and losing party moves within reasonable time of learning of entry of judgment, Rule 60(b) relief may be granted); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980)(Rule 60(b) relief may be granted based on balancing the factors of prejudice, explanation of delay in appealing, and the substantiality of the rights involved); *Mennen Co. v. Gillette Co., supra*, 719 F.2d at 570, n. 5 (party must make more than a showing of excusable neglect for Rule 60(b) relief); *Burkett v. Cunningham*, 826 F.2d 1208, 1217 (3rd Cir. 1987)(in exceptional circumstances, Rule 60(b) relief may be granted outside the time constraints of Rule 4(a)(5)); *Hall v. Community Mental Health Center of Beaver County, supra*, 772 F.2d at 45 (3rd Cir.)(Rule 60(b) relief may be granted when delay is due to reliance on some affirmative behavior of the district court); *Fidelity and Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., supra*, 523 F.2d at 751 (5th Cir.), (where parties rely on court's instructions not to inquire about entry of judgment and do not receive notice of judgment, Rule 60(b) relief will be granted); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970)(per curiam)(in unusual circumstances, court may refer to equitable considerations under Rule 60(b) to vacate a judgment to extend time for appeal); *Spika v. Village of Lombard, Illinois*, 763 F.2d 282, 285 (7th Cir. 1985), certiorari denied, 474 U.S. 1056 (1986)(Rule 60(b) relief may be granted to extend time for appeal on a showing of due diligence); *Buckeye Cellulose Corp. v. Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978)(per curiam)(where clerk does not notify parties of entry of judgment despite telling parties it would do so and counsel diligently inquires about entry, Rule 60(b) relief may be granted); *Harnish v. Manatee County, Florida*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986)(where clerk repeatedly told parties no judgment had been entered when it had been, Rule 60(b) relief granted).

As we show below (pp. 23-27), the due diligence requirement these cases impose is inconsistent with this Court's opinion in *Pioneer Investment Service Co. v. Brunswick Associates Ltd. Partnership.*

Circuit) imposes such a requirement.[10]

Therefore, the Ninth Circuit's requirement that Rule 60(b) cannot be applied where the excusable neglect arises during the period for applying a Rule 4(a)(5) motion conflicts with the determinations of numerous other circuits, which have resolved the conflict between the two rules by imposing a due diligence requirement without adding the Ninth Circuit's requirement concerning when the excusable neglect arises.

IV. THE DECISION BELOW CONFLICTS WITH THE DETERMINATION OF THIS COURT IN *PIONEER* AS TO THE MEANING OF "EXCUSABLE NEGLECT"

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that the court may relieve a party from a final judgment, within one year from entry, for "mistake, inadvertence, surprise, or excusable neglect." The court of appeals indicated that even if Rule 60(b)(1) applied, plaintiff's counsel had not committed "excusable neglect" under Rule 60(b)(1), as defined by *Rodgers v. Watt, supra*, since plaintiff's local counsel had received notice of entry of judgment and plaintiff's lead counsel had failed to demonstrate "due diligence," because she did not ask the

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[10] In *Wallace v. McManus*, 776 F.2d 915, 917 (10th Cir. 1985) (per curiam), the court stated its agreement with *Rodgers v. Watt* that relief should not be precluded when notice of the entry of judgment is not received until after the period for filing a Rule 4(a)(5) motion has expired. It is not clear from the opinion whether the court was also endorsing the corollary of *Rodgers v. Watt*, which was endorsed by the Ninth Circuit in this case, that where the excusable neglect does arise within the period for filing a Rule 4(a)(5) motion, Rule 60(b) relief is not available.

district court clerk whether judgment had been entered over a six-month period. Pet. App. A, p. 10a, n. 3. This position, which required plaintiff to show "due diligence" in order to establish "excusable neglect," directly conflicts with this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, supra,* that excusable neglect includes attorney carelessness, inadvertence, and negligence.

In *Pioneer*, this Court examined the meaning of the term "excusable neglect" as used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. Examining the ordinary meaning of neglect as used in the bankruptcy rule, the Court explained that (113 S. Ct. at 1495):

> Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

As part of its analysis, the Court examined other rules, including Rule 60(b) of the Federal Rules of Civil Procedure, which contain the phrase "excusable neglect." 113 S. Ct. at 1497-1498. The Court concluded that "excusable neglect," as used in Rule 60(b)(1), encompasses inadvertence, mistake, or carelessness. *Id.* at 1497. The Court pointed out that Rule 60(b)(1) clearly covers cases of attorney carelessness, since Rule 60(b)(6), which is mutually exclusive of Rule 60(b)(1), explicitly covers the case where the attorney is faultless, allowing a party to move to reopen judgment even after one year has passed. *Ibid.* The Court explained that (*ibid.*):

> Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect."

The Court stated that, in order to determine whether neglect in any particular case is excusable, a court should balance "all relevant circumstances surrounding the party's omission," including (*id.* at 1498):

> [T]he danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The court of appeals in this case declined to apply the *Pioneer* balancing test. Instead it applied the Ninth Circuit's traditional test, enunciated in *Rodgers v. Watt, supra.* Pet. App. 10a, n. 3. *Rodgers v. Watt* requires that the court consider (722 F.2d at 460):

> (1) absence of Rule 77(d) notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision.

Under this test, the court of appeals held that plaintiff's attorneys' neglect was not excusable, because of "the fact of

actual notice, and the lack of due diligence by lead counsel." Pet. App. 10a, n. 3.

The court of appeals' reasoning makes clear that, under *Rodgers v. Watt*, it was requiring that plaintiff demonstrate substantially more than "excusable neglect." If plaintiff had failed to receive actual notice and plaintiff had exercised "due diligence," plaintiff would have been completely blameless. "Due diligence" is an antonym of "negligence." Hence the court of appeals required that plaintiff not be negligent, in direct contradiction to this Court's determination in *Pioneer* that "excusable neglect" includes negligence. 113 S. Ct. at 1497.

The Ninth Circuit's application of its test to the facts in this case demonstrates the stringency of its "due diligence" requirement. The district court clerk established a consistent pattern of delivering all orders to plaintiff's lead counsel in Washington, D.C. The only order that was not so delivered was the judgment, which was only sent to local counsel in California. Local counsel had not participated in the proceedings and knew that all orders had been sent to lead counsel. As a result of reliance on the pattern of behavior established by the court, lead counsel did not receive actual notice of entry of judgment.

In *Pioneer*, this Court found excusable neglect even though lead counsel admitted receiving actual notice of the bar date for pressing a claim in a bankruptcy proceeding, because the notice was ambiguous. 113 S.Ct. at 1492. The neglect in *Pioneer* consisted of negligence in failing to appreciate or attempting to resolve the ambiguity. However, as the dissent in *Pioneer* noted (*id.* at 1504), there was no evidence that counsel was actually confused by the ambiguity. In contrast, here there is undisputed evidence

that plaintiff's counsel were misled by the court's prior practice of always serving orders on primary counsel. See pp. 5-7, above. Thus, if there is any difference between the two cases, the actions of plaintiff's counsel here were less negligent than the actions of counsel in *Pioneer*.

The holding below consequently is in direct conflict with this Court's determination in *Pioneer* as to "excusable neglect" under Rule 60(b)(1).

V. THE ISSUES RAISED IN THIS CASE ARE OF SUBSTANTIAL IMPORTANCE

The issues in this case arise with considerable frequency in federal litigation and therefore of substantial importance. As the Advisory Committee for the 1991 amendments to the Federal Rules of Civil Procedure observed, failure of courts to mail and the failure of counsel to receive notice of entry of judgment has likely increased in frequency with the growth of caseload in clerk's offices. Notes of the Advisory Committee accompanying Rule 77. As the Advisory Committee also noted, a strict rule requiring counsel to maintain continuous contact with the court while a case is under submission places a burden on counsel and the court. *Ibid.* The burden is even heavier where counsel is outside the district. As we have seen above, the courts have noted that this burden is unrealistic and unfair.

Moreover, the problem of communication between primary and local counsel continues to arise with considerable frequency. Under the decision of the court of appeals, this problem cannot be addressed under Rule 4(a)(6) of the Federal Rules of Appellate Procedure because local counsel received notice within the 21-day period after entry of judgment or under rule 60(b)(1) of the Federal Rules of

Civil Procedure because the excusable neglect arose during the 60-day period for filing a notice of appeal. Thus, according to the court of appeals, losing parties are denied any opportunity to seek relief for "excusable neglect" relating to miscommunication between primary and local counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

Rule 4 of the Federal Rules of Appellate Procedure provides in pertinent part:

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or

10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Rule 60 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 60. Relief From Judgment or Order

* * *

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 77 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 77. District Courts and Clerks.

* * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to

relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16103

JACK C. SMITH,

Plaintiff-Appellant,

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge.
(CV-87-06134-JPV)

Argued and Submitted November 3, 1993
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: CANBY and NOONAN, Circuit Judges, and HUFF,** District Judge

Jack Smith brought this wrongful termination action against his former employer, the United States Postal Service. Smith contended that he had been improperly discharged because of his physical handicap, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The district court, adopting the findings and conclusions of law of a magistrate, rendered judgment against him.[1] Approximately five-and-a-half months after judgment was entered, Smith moved the district court to reopen the time for filing a notice of appeal or to vacate and reenter the judgment. The district court denied this motion, and Smith appeals. We affirm.

BACKGROUND

The district court entered judgment on July 19, 1991. Although Smith's local counsel in San Francisco received notice of the entry of judgment, his "lead" counsel in Washington, D.C., failed to receive such notice. Allegedly because the court sent all previous communications to both attorneys, Smith's local counsel failed to inform lead counsel of the entry of judgment. Under Fed. R. App. P. 4(a)(1), Smith had sixty days to file notice of appeal. The district

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** The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

[1] This was the second judgment entered against Smith. We overturned the first judgment because the district court, after rejecting Smith's attempt to file overly-lengthy objections to the magistrate judge's report, had then refused to permit Smith to file a late set of shortened objections. Smith v. Frank, 923 F.2d 139 (9th Cir. 1991).

court had the power to extend this period for a maximum of thirty days. Fed. R. App. P. 4(a)(5). Because Smith failed to file notice of appeal within the original sixty-day period or request an extension of time, his possibility of appeal was extinguished in September 1991.

On December 1, 1991, Rule 4(a)(6) of the Federal Rules of Appellate Procedure became effective. Rule 4(a)(6) gave district courts a much greater period of time in which they may reopen the time for appeal. According to the new provision, if a party failed to receive notice of the judgment and the party files a motion within 180 days of the entry of judgment, the court has discretion to reopen the time for 14 days.

Five-and-a-half months after the entry of judgment, the defendant's attorney called Smith's lead counsel on a related matter and mentioned the judgment. This apparently was the first time Smith's lead counsel had heard about it. One week later, on January 9, 1992, Smith's lead counsel moved the district court to extend the time to appeal under Fed. R. App. P. 4(a)(6) or in the alternative to vacate and reenter the judgment under Fed. R. Civ. P. 60(b)(1) or (6). The motion was filed within the 180-day period permitted by the new rule. The district court denied the motion.

DISCUSSION

I. Reopening the Time for Appeal Under Rule 4(a)(6).

Smith contends that amended Rule 4(a)(6) applies, even though his opportunity for an extension of time to appeal had expired while the prior version of the Rule was still in effect. Smith argues that the new version of the Rule

resurrects his opportunity, because his motion was made within 180 days of judgment, as the amended Rule specifies. He also contends that the district court abused its discretion in denying relief under the amended Rule.

The government, not surprisingly, objects to Smith's attempt to apply the amended Rule "retroactively." We need not decide, however, whether the amended Rule extends to cases such as Smith's, because we conclude that Smith could not obtain relief even if amended Rule 4(a)(6) applies.

For a party to obtain relief under amended Rule 4(a)(6), he first must show that he failed to receive adequate notice. Each party is considered to have notice of all facts of which his attorney is on notice. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962), *citing Smith v. Ayer*, 101 U.S. 320, 326 (1879). Where a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment. *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986).

Smith does not dispute that his local counsel received a copy of the notice of entry of judgment.[2] Under *Link* and

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[2] Smith asserts that he had relied on the court's consistent practice of sending all communications to lead counsel and argues that he received no adequate notice when the court mailed the entry of judgment to his local counsel only. This argument fails under Link and Alaska Limestone. Although the Link rule of constructive notice may seem harsh in some circumstances, it is not harsh here. The local rules of the district court required Smith to designate local counsel "upon whom copies of pleadings may be served and with whom the judge and opposing counsel may communicate concerning the conduct of the action." N. Dist. Cal. L.R. 110-2(a). If the district court was required to communicate with out-of-town counsel to give adequate notice, the

Alaska Limestone, Smith had notice and, thus, the district court was precluded from granting relief under Rule 4(a)(6). Consequently, the district court could not have abused its discretion in denying Rule 4(a)(6) relief.

II. Reentry of Judgment Under Rules 60(b)(1) and (6).

Under Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a party from a final judgment "for the following reasons: (1) mistake, inadvertence, surprise, or *excusable neglect;* . . . or (6) any other reason justifying relief from the operation of the judgment." (Emphasis added).

In *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), this court permitted a prospective appellant whose opportunity to appeal pursuant to Rule 4(a) had expired to obtain relief under Rule 60(b), by vacating the judgment and entering a new judgment from which timely appeal could be taken. We recognized, however, that this use of Rule 60(b) threatened the integrity of the deadline imposed by Rule 4(a). *Id.* at 459. Accordingly, we held "that Rule 60(b) is available in situations where the excusable neglect does not arise until after the sixty day period" specified in Rule 4(a). *Id.*

Smith's appeal does not meet this last requirement. Judgment was entered on July 18, 1991. Smith's local counsel received notice of the judgment on July 23, 1991. The neglect in failing to file a notice of appeal consequently arose prior to the expiration of the period specified in Rule

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rule requiring designation of local counsel would be of little use to the district court.

4(a) both for appeal and for extension of time to appeal. Smith is therefore precluded from relief under Rule 60(b)(1) by our holding in *Rodgers*.[3]

Smith also appeals the district court's failure to grant relief for "any other reason justifying relief" as contained in Rule 60(b)(6). Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive, however. *See Pioneer Investment*, 113 S. Ct. at 1497. "If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.* Relief under Rule 60(b)(6) requires a party to "show 'extraordinary circumstances,' suggesting that the party is faultless in the delay." *Id.* Such relief "normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Smith consequently cannot qualify for Rule 60(b)(6) relief; his counsel's neglect does not qualify as a circumstance beyond Smith's control.

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[3] It is also most unlikely that the neglect of Smith's attorneys could be found "excusable." Under Rodgers, the fact of actual notice, and the lack of due diligence by lead counsel who failed to inquire for six months, would count against Smith. Rodgers, 722 F.2d at 460. Even under the somewhat relaxed standard of "excusable neglect" applied by the Supreme Court in a bankruptcy context, a finding of excusable neglect was affirmed primarily because of a deficiency in the notice given to counsel. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489, 1498 (1993). Moreover, the attorneys in Pioneer missed the deadline by a mere 20 days, not six months.

CONCLUSION

The district court did not err in denying relief under Fed. R. App. P. 4(a), nor did it abuse its discretion in denying relief pursuant to Fed. R. Civ. P. 60(b). The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK C. SMITH, Jr.,	)	No. C-87-6134-JPV
	)	
Plaintiff	)	ORDER DENYING
	)	PLAINTIFF'S
	)	MOTION TO REOPEN THE
v.	)	TIME FOR FILING A
	)	NOTICE OF APPEAL,
	)	OR ALTERNATIVELY, TO
ANTHONY M. FRANK,	)	VACATE AND REENTER
	)	THE JUDGMENT
	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal, or Alternatively, to Vacate and Reenter the Judgment was scheduled to be heard on February 6, 1992. After a review of the briefs, this court considered it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1, and now DENIES the motion.

PROCEDURAL HISTORY

Plaintiff filed this action pursuant to 29 U.S.C. § 701, *et. seq.* against the U.S. Postal Service for terminating plaintiff from his position as a distribution clerk because of his physical handicap. This Court assigned the action to Magistrate Brennan as a special master under Rule 53,

Federal Rules of Civil Procedure, to conduct the trial, and make recommended findings of fact and conclusions of law. On September 20, 1989, Magistrate Brennan issued proposed findings of fact and conclusions of law, and recommended that judgment be entered in favor of the defendant. Plaintiff then filed fifty nine pages of objections to the Magistrate's findings, conclusions and recommendation. After refusing to consider plaintiff's oversized brief, this Court, on November 29, 1989, adopted Magistrate Brennan's findings of fact and conclusions of law, and dismissed the action with prejudice.

On January 9, 1991, the Ninth Circuit reversed and remanded, directing this Court to permit plaintiff to file his objections in a brief which conformed to the page limitation. Thereafter, plaintiff filed his objections on May 23, 1991. Defendant filed a brief in response to plaintiff's objections on June 20, 1991. Plaintiff filed a reply brief on July 5, 1991. On July 18, 1991 this Court issued an Order adopting the Magistrate's findings of fact and conclusions of law. Pursuant to the Order, final judgment was entered against plaintiff on July 19, 1991.

Pursuant to Rule 77(d), Federal Rules of Civil Procedure, notice of entry of judgment was mailed to one of plaintiff's attorneys of record, "local" counsel James E. Eggleston, and received by Eggleston's office on July 23, 1991. Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, plaintiff was required to file his notice of appeal within 60 days from entry of judgment, i.e. by September 17, 1991. However, plaintiff's other attorney of record, "lead" counsel Susan J. McGolrick, declares that the notice of entry of judgment was not sent to or received by her office, even though all previous court orders had been sent to her office

by the court. Unfortunately for the plaintiff, Eggleston's office filed away the notice without informing McGolrick's office that judgment had been entered, and failed to file a timely notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

McGolrick declares that she did not become aware of the judgment until January 2, 1992, and has thus, filed this motion pursuant to Rule 4(a)(6), Fed.R.App.P., to reopen the time for filing a notice of appeal, or alternatively, to vacate and reenter the judgment pursuant to Rule 60(b), Fed.R.Civ.P.

DISCUSSION

I. Motion to Reopen

Amended Rule 4(a)(6) of the Federal Rules of Appellate Procedure, which became effective on December 1, 1991, provides:

> The district court, if it finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Plaintiff contends that amended Rule 4(a)(6) applies to this case because the so called "lead" counsel McGolrick did not

receive notice of the entry of judgment until January 2, 1992, not within 21 days of its entry, and filed this motion within 180 days of its entry and within 7 days of receipt. Plaintiff argues that, "the Court established a long and consistent practice of dealing directly with plaintiff's "lead" counsel, who performed all of the work in representing plaintiff in this case. Plaintiff's "local" counsel had no substantive involvement in this case and has made no court appearances." Thus, under these particular facts, the Court, by notifying "local" counsel and not "lead" counsel, failed to notify plaintiff of the entry of judgment.

Plaintiff's argument is totally without merit. In the first place, this Court questions whether Amended Rule 4(a)(6) is even applicable to this case. Amended Rule 4(a)(6) became effective on December 1, 1991. In adopting the amendments to the Federal Rules, the Supreme Court provided that "The foregoing amendments . . . shall take effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending." 59 U.S.L.W. 4359. The Supreme Court did not state that the Rules would be applied retroactively to revive those cases, such as this one, in which the time to appeal had already expired. Even under the application of the Supreme Court, the only way this case comports as an "appellate case then pending" is if the amended Rule is applied, thus putting the "cart before the horse."

Even assuming, however, that amended Rule 4(a)(6) applies, reopening the time for appeal is not warranted. The rule specifically provides the district court with the authority to reopen the time for appeal only in those cases where the "party entitled to notice of the entry of a judgment or order

did not receive such notice from the clerk or any party within 21 days of its entry." (emphasis added). According to the Advisory Committee notes:

> The amendment provides a *limited* opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendments adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal *upon a finding that notice of entry of a judgment or order was not received from the clerk* or a party within 21 days of its entry.

Based on the facts of this case, this Court can not make such a finding. It is undisputed that notice of entry of judgment, mailed by the clerk of the court pursuant to Rule 77(d), Fed.R.Civ.P., was *received* by one of plaintiff's counsel of record on July 23, 1991, within 21 days of its entry. "[R]eceipt of notice by one of two counsel of record, as here, sufficiently informs the party of the entry of judgment." *Alaska Limestone Corp. v. Hodel*, 779 F.2d 1409, 1411 (9th Cir. 1986)(citations omitted). This case does not present this Court with one of those "*limited*" situations which amended Rule 4(a)(6) is to apply, i.e. where notice of entry is not received by a party. Amended Rule 4(a)(6) was not meant to relieve "local" and/or "lead" counsel from the obligation of communication. Therefore, relief under Rule 4(a)(6) is inappropriate.

II. Motion to Vacate and Reenter

In the alternative to relief under amended Rule 4(a)(6), Fed.R.App.P., plaintiff has requested that this Court vacate and reenter judgment pursuant to Rule 60(b), Fed.R.Civ.P., which provides:

> the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

In *Rodgers v. Watt*, 772 F.2d 456 (9th Cir. 1983) (en banc), the Ninth Circuit set forth a four factor test for the application of Rule 60(b)(1) to give relief from a judgment in order to reopen the time to appeal: "(1) absence of Rule 77(d) notice; (2) lack of prejudice to the respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to become informed of the date of the decision." *Id.* at 460.

In this case, plaintiff can not meet this test because notice of entry of judgment was mailed to, pursuant to Rule 77(d), and received by one of plaintiff's counsel. Plaintiff's assertion that he did not receive adequate notice of the entry of judgment, "given the Court's previous, long-standing practice of directly notifying plaintiff's "lead counsel" has no merit. Plaintiff can not cite one case which holds that notice to plaintiff's "local" counsel is ineffective or deficient notice to the plaintiff under Rule 77(d). "Local" counsel was counsel of record in this matter, and was properly notified

by the clerk of this Court of entry of judgment pursuant to Ruled 77(d). This constitutes sufficient notice to plaintiff. *See Alaska Limestone Corp.*, 799 F.2d at 1411.

Moreover, even assuming notice of entry of judgment was not mailed to and received by plaintiff's counsel, plaintiff's counsel can not demonstrate due diligence, or reason for lack thereof, in attempting to become informed of the date the judgment was entered. "A party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time." *Alaska Limestone Corp.*, 799 F.2d at 1412 (9th Cir. 1986) (citations omitted). "Lead" counsel for plaintiff can not justify his failure to inquire with the court or opposing counsel of the status of the case for almost six months, from July 5, 1991 to January 2, 1992. In fact, it appears that "lead" counsel only became aware of the judgment in this case when opposing counsel called her on a related matter. Had that conversation never taken place, "lead" counsel might not have known of the judgment to this day. Such inaction does not constitute due diligence, and therefore, relief under Rule 60(b)(1) is inappropriate.

Relief under Rule 60(b)(6) is also inappropriate. Rule 60(b)(6) has generally been held to apply only to those "extraordinary circumstances" which are outside the scope of Rule 60(b)(1) - (5). *See generally Klapprott v. United States*, 69 S.Ct. 384 (1949); *Ackerman v. United States*, 71 S.Ct. 709 (1950). In this case, plaintiff's "reliance on the district court to send the notice of judgment to one counsel rather than the other does not . . . constitute a unique circumstance . . ." *Alaska Limestone Corp.*, 799 F.2d at 1412. Rather, this case falls under those situations which

happens far too often, inexcusable neglect by counsel. "Local" counsel's failure to properly handle the notice of entry of judgment, and "lead" counsel's failure to check on the status of the case, do not justify relief under Rule 60(b)(6).

ORDER

In accordance with the foregoing discussion, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal, pursuant to amended Rule 4(a)(6), Federal Rules Appellate Procedure is DENIED.

2. Plaintiff's Alternative Motion to Vacate and Reenter Judgment, pursuant to Rule 60(b)(1) or (6), Federal Rules of Civil Procedure, is DENIED.

DATED: April 22, 1992

J.P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF COLUMBIA

JACK C. SMITH,

Plaintiff,

v.

ANTHONY M. FRANK,

Defendant.
_____/

NO: C-87-6134 JPV (JSB)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Plaintiff Jack C. Smith ("Smith") alleges that defendant Anthony M. Frank, Postmaster General of the United States Postal Service ("Postal Service") improperly terminated Smith's employment with the Postal Service in violation of Section 501 of the Rehabilitation Act of 1973 which prohibits federal agencies from discriminating against employees or applicants for employment on the basis of disability. In particular, Smith alleges that the Postal Service terminated him because of his back ailments in spite of the fact that he was able to perform the essential functions of a distribution clerk without endangering himself or his coworkers.

Judge Vukasin referred the matter to this Court for an evidentiary hearing and findings of fact, conclusions of law and recommendations. An evidentiary hearing was commenced on June 26, 1989. David L. Rose, Esquire and Laraine L. Laudati, Esquire appeared on behalf of plaintiff; JoAnn M. Swanson, Assistant United States Attorney and Beth McGarry, Special Assistant United States Attorney

appeared on behalf of defendant. After three days of testimony the matter was continued until August 14, 1989 in order that the parties could complete further discovery. Following three and one-half additional days of testimony concluding on August 17, 1989 the matter was submitted.

An evidentiary hearing having been held and the matter having been duly considered the Court makes the following findings of fact, conclusions of law, and recommendations:

I. FINDINGS OF FACT

1. In January 1968 defendant hired Smith to be a distribution clerk in the Concord, California Post Office.

2. Prior to 1976, Smith worked the "swing tour" from 3:00 p.m. until 11:00 p.m. Initially, Smith's duties during this period included loading and unloading trucks and loading and unloading parcels and sacks. During this period his duties as a distribution clerk also included sorting and distributing mail at his "case." A case is a counter with an upright grid of pigeonholes for different carrier routes within specific zipcodes. Each case corresponds to a particular "scheme." There are several schemes at the Concord Post Office. A scheme consists of 100 items or more which reflect the routes and corresponding addresses within each zipcode. As he gained seniority and scheme knowledge Smith did less loading of trucks and less heavy lifting.

3. During he period from 1976 until 1982, Smith worked the "midnight tour" from midnight until 7:30 a.m.

4. During the course of his employment Smith has undergone five back surgeries. These operations occurred

in January 1973, October 1980, July 1982, September 1982 and June 1984.

5. On January 2, 1973 Smith was admitted to Mt. Diablo Hospital with a diagnosis of degenerative disc disease of the lumbar spine with possible herniated disc. On January 11, 1973 plaintiff underwent his first back surgery: a laminectomy and discectomy at L3-L4 and L4-L5 on the right side.

6. In October 1980 Dr. Clyde O'Neill performed a lumbar laminectomy at L4-L5 on the left side.

7. On July 7, 1982 Dr. O'Neill performed a left lumbar exploration and discectomy at L3-L4.

8. On September 15, 1982 Dr. O'Neill performed laminectomies at L3-L4, L4-L5, and L5-S1 on the left side and a repeat discectomy at L4-L5.

9. On June 12, 1984 Dr. Charles W. Barnes, assisted by Dr. O'Neill, performed a posterior lumbar interbody fusion at L3-L4, L4-5 and L5-S1.

10. Following each operation Smith was on sick leave or leave without pay for approximately three months.

11. As a result of his back ailments, Smith also suffers a "dropped foot" which means he cannot pick up his left foot. This ailment produces a shuffling walk or slap gait. Smith's "dropped foot" results from impingement of the nerve root at L5 (probably from post-operative scarring) and has been noticeable since 1982. Transcript of Dr. Lin Ho, M.D. Trial Transcript, at 95, line 7 to 97, line 2.

12. Following his last surgery in 1984 Smith returned to work on temporary light duty status. Article 13 of the national collective bargaining agreement between the Postal Service and the American Postal Workers Union and the National Association of Letter Carriers provides that an employee recuperating from a serious illness or injury and unable to perform all his assigned duties is eligible for temporary light duty.

13. Following the June 1984 fusion surgery Smith's treating physician, Dr. Barnes, imposed several limitations on Smith. "[T]he patient can stand, sit 6-8 hours a day though with several breaks, more for changing position. He should avoid heavier lifting, keeping lifting to 10-15 pounds, and that not on a frequent basis. Repetitive bending as well as twisting should be avoided." Plaintiff's Exhibit 27.

14. In September 1984, defendant ordered Smith to submit to a fitness for duty examination to be conducted by Dr. Willie L. Wilson, Postal Medical Officer. Following the examination, Dr. Wilson reported to Postmaster Helm that, "Mr.Smith has medical clearance to return to light duty, 9-12-84." Dr. Wilson imposed the following limitations on Smith:

(1) can work up to 8 hr/day
(2) should have the freedom to sit & stand at will
(3) Limited stooping
(4) *No* bending
(5) can lift up to 10 *lbs.*

Plaintiff's Exhibit 35, Memo dated 9/5/84 from Willie Wilson, M.D. to Postmaster, Concord. Accordingly, on September 6, 1984, Postmaster Helm wrote to Smith

informing him that his request for light duty was granted, he could return to work with the restrictions imposed by Dr. Wilson and he would be re-evaluated in four months. Plaintiff's Exhibit 19.

15. In 1985, distribution clerks at the Concord Post Office worked in three different areas -- unloading mail trucks, breaking down or "staging" mail, and distributing mail to specific carrier routes.

16. Unloading the trucks entails pushing or pulling mail containers off the truck and onto the loading dock and into the staging areas. The mail arrives in aluminum containers, hampers, or wooden pallets. The containers, which weigh 475 pounds when empty, are loaded with mail sacks (weighing up to 70 pounds), tubs of flats (weighing up to 50 pounds), trays of letters (weighing up to 20 pounds), or parcels.

17. In the staging areas the clerks unload the incoming mail containers and hampers and organize the mail on platform trucks by zipcode. This requires bending or reaching to lift a tray, tub, or bundle out of the container and to place it on a platform truck. The clerks also lift parcels out of the large containers and place them in hampers or utility carts designated by zipcodes. Then the clerks push the platform trucks or utility carts to the distribution area. Platform trucks have a gross capacity of about 1500 pounds. Utility carts weigh approximately 250 pounds when full.

18. In 1985 distribution of letters required that the clerk bend to lift a tray from a sideless flat metal cart, known as a nutting truck, and then dump the mail from the tray onto the ledge of the letter sorting case. While standing erect or

leaning on a rest bar the clerk then sorts the mail into the pigeonholes of the case.

Once the cases are full, all the clerks working a particular scheme simultaneously perform a "pull down." A "pull down" consists of taking an empty tray and, walking in front of the row of cases, pulling down all of the letters in each case which belong to a specific carrier route. After pulling down all the letters for a specific route from all the cases, the clerk places the tray on a tray cart ("pie rack"). A fully loaded "pie rack" holds between 24 and 35 trays and weighs between 730 and 970 pounds. The clerk pushes the "pie rack" to the carrier section of the post office and dumps two trays onto the carrier's ledge and stacks the remaining trays on top of the dumped letters.

19. Distribution of flats, flat pieces of mail wider than letters such as manilla envelopes, entails lifting tubs of flats weighing up to fifty pounds off the nutting truck and onto the ledge of the sorting case. Flat sorting cases are larger than letter sorting cases and thus require more movement on the part of the distribution clerk. When "pulling down" flats, the clerk places the flats on a nutting truck, which contains a wooden device to layer the mail by route, and pushes the truck to the carrier area. Then the clerk must bend and lift the flats off the truck and place them in a wooden case in the carrier's section.

20. Distribution of parcels entails removing the parcels from the large containers and placing them in hampers by zipcode. Fully loaded, the hampers can weigh up to 500 pounds. Distribution clerks push these hampers to the carrier area where they bend and lift the parcels out of the

hampers and place them into specific carrier route hampers. Parcels may weigh up to 70 pounds.

21. Of the above-described duties of a distribution clerk, scheme knowledge was not required for unloading trucks, breaking down mail, placing mail on case ledges, pull downs, and moving mail after pull downs to the carrier areas. The supervisors preferred to keep more senior clerks sorting mail at the cases as opposed to performing duties not requiring scheme knowledge.

22. While on light duty status Smith would sort local bulk mail when he first arrived at the post office. These bulk mailers would include bundles of about fifty letters apiece rubber-banded together. Such bundles would weigh about one pound. Smith would sort these bundles from a tub at the end of the case. Smith would normally sort at the first case in the line and the tub would not be in anyone's way. At this time of the shift the other clerks would generally be sorting bulk flats or bulk business mail flats or they would be staging the breakdown area for in-coming mail. Smith could not perform these duties because of his weight limitations and the stooping and bending restrictions.

23. After sorting the local bulk mail Smith would sort first class mail. The supervisor or another distribution clerk would provide Smith with a tray of mail since his weight limitations prohibited lifting the trays.

While on light duty Smith did not sort flats or parcels. Sorting flats would require lifting more than ten pounds and a significant amount of turning and twisting at the flat case. Many parcels weigh more than ten pounds and sorting parcels required lifting, carrying, and throwing parcels.

Generally, in 1985 distribution clerks would on an average be asked to distribute parcels once in ninety days for a maximum of four hours.

24. While on light duty Smith did not participate in pull downs. Pull downs required lifting and carrying fifteen to twenty pound loaded trays. During pull downs Smith would move to another scheme which was not being pulled down and sort letters there. If the other schemes were also being pulled down, Smith would take a break or remain idle during the pull downs.

25. In 1985, it would be unlikely that a distribution clerk with Smith's seniority would be called upon to load or unload trucks, distribute parcels, or break down mail. Furthermore, about half the crew preferred to sort first class flats and a small group of distribution clerks did so on a regular basis.

26. The Postal Service's *Key Positions Descriptions* describes the duties and responsibilities of a distribution clerk as follows:

> (A) Makes primary and one or more secondary distributions of incoming mail by delivery point . . . based on a knowledge of the distribution scheme established for that office.
>
> (B) Makes primary and one or more secondary distribution of outgoing mail for dispatch . . based on a knowledge of the distribution scheme prescribed by the Postal Transportation Service.

(C) In addition, may perform any of the following duties:

(i) Maintains records of mails.
(ii) Examines balances in advance deposit accounts.
(iii) Faces and cancels mail.
(iv) Ties mail and inserts facing slips.
(v) Opens and dumps pouches and sacks.
(vi) Operates cancelling machines.
(vii) Records and bills mail . . . requiring special service.
(viii) Renders service at public windows.

Plaintiff's Exhibit 1.

27. Kathryn MacRae, a supervisor of mails for the postal service, considered Smith above average in proficiency in the number of letters that he could distribute in his letter case and ranked him in the top third of all distribution clerks. Fred Blackburn, another post office supervisor, considered Smith an average clerk. Jack L. Watkins, President of the American Postal Workers Union Local in Concord, considered Smith to be of above average proficiency in mail distribution. Smith's co-workers did not complain that he was on light duty.

28. MacRae observed Smith to have problems with mobility and to be suffering from a great deal of pain. He shuffled as he moved and "[e]verything was done very deliberately, as if to avoid pain." Trial Transcript at 359, line 25. On one occasion Smith left early complaining that he "'couldn't stand the pain anymore.'" Id. at 360, line 8.

Blackburn made similar observations,

> This time [as compared to his recovery from previous surgeries] he was having problems walking ... he'd walk more of a shuffle than he did on a walk. He walked -- he moved a lot slower than what he had in the past. Very cautiously.
>
> He wasn't vocal any more....
>
> * * *
>
> But it just wasn't the same Jack as what we had before, in the sense that it looked like he was laboring. It was a strain to get through the eight hours more than what is [sic] was in the past.
>
> * * *
>
> [I]t became a concern whether or not we were really helping Jack by allowing him to work without hurting himself.

Id. at 195, line 17 to 196, line 14.

29. In February 1985, defendant ordered Smith to submit to a second Fitness-for-Duty examination. At this examination Smith reported to Dr. Wilson that Smith's condition had not improved and that he had missed some days of work because of the pain. He could not sit for more than thirty minutes. He still had a foot drop and was having

problems standing on the cement floor for eight hours per day, five days per week.

Dr. Wilson concluded:

> It is my medical opinion that Mr. Smith *is not fit for duty* for the position of full-time distribution clerk. This decision is based upon his complaints of lower back pain/discomfort that has affected both legs but especially the left....The functional/environmental requirements of heavy lifting/carrying/pushing or pulling, prolonged standing/walking, and/or prolonged sitting as sitting on a restbar or even in a chair with a straight back, frequent or repetitive bending/stooping, and/or protracted hours of work *can endanger his health and safety.* Limitations are unchanged from those of September 1984 - ie, (1) can work up to eight hours per day, (2) Should have the freedom to sit and stand at will, (3) limited stooping; no bending, (4) can lift up to ten pounds; no carrying/pushing or pulling over ten pounds. (Emphasis in original.)

Defendant's Exhibit G, at 28, Fitness for Duty Determination. Dr. Wilson was concerned that if Smith returned to regular work his degenerative back condition would deteriorate more rapidly. Trial Transcript, at 245, lines 3-5.

30. William A. Helm is the Postmaster for Concord and Pleasant Hill, California. He has held that position since May of 1983.

31. After receiving Dr. Wilson's Fitness for Duty Determination, Postmaster Helm met with his managers Bob Blackburn and Gene Porta to discuss the report. Postmaster Helm then requested supplemental information from Smith's treating physician, Dr. Barnes. In a letter to Smith dated April 26, 1985 Helm asked Smith to have Dr. Barnes address the following points:

1. Ability to lift 75 lbs.
2. Constant standing, stooping, reaching, bending.
3. Ability to work up to 11 hours per day and 6 days per week with the requirements in #1 and #2.

Defendant's Exhibit J-3, at 19. In response, Dr. Barnes remarked, "[s]hould *not* for another 6 months if all goes *well*! Remain light duty!!" (Emphasis in original.) Id.

32. On the basis of the requirements of a distribution clerk position, Smith's medical restrictions, absence record, and employment history, and the then current mail conditions at the Concord office, Postmaster Helm terminated Smith's light duty authorization.

33. Helm considered reassigning Smith to other craft positions at the Concord Post Office. Only positions as letter carrier and custodian were available. Helm determined that reassignment to either position would be an inappropriate action since the jobs required physical activity

beyond Smith's medical restrictions. For instance, a letter carrier does all the same work a distribution clerk does and transports the mail to a vehicle and then delivers the mail by vehicle or foot. Likewise, a custodial position also requires intense physical activity such as carrying buckets of water, climbing ladders and working overhead.

34. Helm did not consider reassigning Smith to any other post office positions because such positions were bid jobs, subject to the terms of the collective bargaining agreement.

35. On May 22, 1985 Helm wrote to Smith informing him that his light duty status would terminate on June 7, 1985. Defendant's Exhibit G, at 34.

36. On June 11, 1985 Supervisor Fred Blackburn wrote to Smith informing him that he would be separated form the Postal Service. Blackburn explained, "[w]e are unable to continue to provide work for you under the limitations set by your doctor. Furthermore, we are very concerned that you could further aggravate your back condition and endanger yourself or other employees by placing you in a work status." Defendant's Exhibit G, at 35.

37. Since his termination from the post office, Smith has suffered several traumatic incidents.

38. In 1986 and 1987 Smith was employed by the Martinez Cab Company as a driver and later as a dispatcher. During the course of this employment Smith was the victim of two physical assaults. During the first year of his employment at the cab company Smith was assaulted by the boy friend of a rape victim whom Smith was escorting home

from the hospital. Smith reported that he strained his back trying to avoid the assault and the resulting pain lasted perhaps a week, but not longer than a month. On August 5, 1987 Smith was the victim of an armed robbery while working as a dispatcher. One of the two robbers put a gun to Smith's head and asked him for the money. After telling his assailants that the money, if any, would be in a file cabinet, they took him to the back of the building where they tied and gagged him, slashed him in the face with a knife, and threatened to harm him further if they did not recover any money.

39. Following the robbery Smith sought treatment from a psychiatrist, James S. Gracer, M.D. Dr. Gracer treated Smith for post-traumatic stress disorder.

40. On January 1, 1988, while riding a bicycle, Smith was hit from the rear by a car, suffering a compression fracture at L2. Defendant's Exhibit J-1, at 46. Prior to the bicycle accident Smith was riding his bicycle fifty miles a day.

41. On July 2, 1988 Smith was involved in an automobile accident in which he was rear-ended. Smith did not experience any immediate pain but that night began feeling pain in his neck, low back, and right shoulder. Smith underwent an arthrogram in September, 1988 and a diagnosis of a rotator cuff tear in his right shoulder was made. As a result of the arthrogram procedure, Smith developed an infection in his shoulder. On May 22, 1989 Dr. Norris operated on Smith's right shoulder. The surgery disclosed no rotator cuff tear. Rather, Dr. Norris only found torn muscles which he reattached. Smith was still wearing a sling at the time the evidentiary hearing

commenced on June 26, 1989. Dr. Lin Ho, M.D. testified on August 14, 1989 that it was still too early to say whether or not Smith's shoulder surgery was successful and that it takes six months generally to know how successful such surgery is. Trial Transcript, at 157, lines 7-10.

42. On March 19, 1986, less than one year after his termination and prior to any of the traumatic incidents described in ¶'s 38, 40, and 41, supra., Smith began weekly visits to the Veteran's Administration Out Patient Clinic for the treatment of chronic intractable pain. These visits continued on a weekly basis through January of 1988. Smith visited the clinic again twice in May of 1988. All together Smith had over fifty appointments with Dr. George Shardlow of the V.A. pain clinic. During these visits Smith frequently complained of pain, numbness, and muscle spasms. Smith did not disclose to defendants that he was receiving treatment for chronic pain from Dr. Shardlow until defendants discovered a reference to such treatment in the records of Dr. Becker which were finally produced pursuant to court order after the commencement of trial.

43. Dr. Robert B. Cahan is a psychiatrist who examined Smith at the request of the defendant. Dr. Cahan interviewed Smith, reviewed his medical and related records, and had Dr. Fred Rosenthal conduct a series of psychological tests on Smith. Based upon the interview, review of records, and tests, Dr. Cahan diagnosed Smith to be suffering from, inter alia, an intermittent explosive disorder. In making this diagnosis Dr. Cahan relied on evidence of impulsive and explosive behavior since childhood including running away at ages eleven and thirteen, drawing his rifle on a drill instructor while in the military, throwing his wife across the room, assaulting

several Oakland police officers, assaulting a V.A. psychiatrist, slugging a drunken customer at the cab company, holding a gun to his own head and contemplating suicide, attempting suicide by taking a large dosage of valium, and berating a neighbor who swore at Smith's son and threatened his dog. Cahan Trial Testimony at 391-394.

Cahan also diagnosed post traumatic stress syndrome relating to the robbery incident at the Martinez Cab Company. This diagnosis was based upon psychosomatic conditions including tension headaches, muscle spasms, and diarrhea.

Dr. Cahan concluded:

> Well, some physicians have been of the opinion that he is not capable of doing the amount and duration of exertion that he would have to do [to perform the duties of a distribution clerk.] And so there is a danger to himself and his health because of a pattern of not cooperating with the physician.
>
> He tends to suppress or hides symptoms which must make it very difficult for the physician to be not only correct but secure in his diagnosis and recommendations. He fails to follow the restrictions in activity. He fails to take his medication.
>
> And all this, because inside it's so important for him to continue to be healthy and strong and capable. And to have that

> image. And to feel that way. So much so that he denies anything that differs with that idealized image of himself.

Id., at 409 line 18 to 410 line 7.

44. In a May 3, 1989 report to Dr. Norris, Dr. Becker noted that,

> The patient told Dr. Gracer considerably more details about his past psychiatric history than the patient would acknowledge when he saw me.

Defendant's Exhibit O, at 7.

45. Smith told his treating psychiatrist, Dr. James Gracer, that if Smith lost this lawsuit he would physically harm four named Postal Service employees.

Following the robbery incident, Smith kept loaded guns in his house, had a fear of leaving the house, and at times carried a gun with him when he left the house. Dr. Gracer believes that Smith no longer carries a gun.

46. Dr. Gracer described Smith's view of himself as a macho, prove-himself-physically type of guy. Trial Transcript, at 534 lines 7-11. Smith informed Dr. Gracer that Smith disregarded his doctor's instructions about wearing a sling. Id. at lines 12-17.

II. CONCLUSIONS OF LAW

1. Jurisdiction in this Court exists under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 794a(a)(1).

2. A prima facie case of handicap discrimination consists of evidence that (1) the plaintiff is handicapped within the meaning of the Act; (2) the plaintiff is a "qualified handicapped person;" and (3) the plaintiff was terminated because of his handicap. *Manolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

3. The statute defines a handicapped person as one who, "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. 706(8)(B)(i). It is undisputed that plaintiff is handicapped within the meaning of the Rehabilitation Act.

4. A "'qualified handicapped person' means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. 1613.702(f). Thus, a handicapped employee need not be able to perform all the functions of the job in order to be considered "qualified."

5. The Court finds that Smith was able to perform the essential functions of the distribution clerk position. The description of the position (see ¶ 26, supra) demonstrates that the primary responsibility of the job of distribution clerk is to sort mail per scheme knowledge. Moreover, the testimony of Watkins, Blackburn, MacRae, and Smith

establishes that a distribution clerk with Smith's seniority only occasionally performed the other duties of a distribution clerk such as unloading trucks, distributing parcels, or breaking down mail. Furthermore, Smith was considered to be at least an average clerk so far as his proficiency in sorting mail.

Admittedly, Smith was unable to perform the function of pull downs, a function performed by distribution clerks with Smith's seniority. However, because Smith had knowledge of more than one scheme, he could be assigned to sort mail at another work station and was rarely idle during pull downs. To have Smith sort mail at another scheme when a pull down occurred at the scheme where he had been working made reasonable accommodation for his physical handicap.

6. The regulations require that a federal agency make "reasonable accommodation" to a handicapped employee. 29 C.F.R. 1613.703(a). See also *School Board of Nassau County v. Arline*, 480 U.S. --, 107 S.Ct. 1123, 1131 n. 17. Furthermore, "[r]easonable accommodation may include, but shall not be limited to: * * * (2) job restructuring, part-time or modified work schedules, acquisition or modification or equipment or devices, * * * and other similar actions." 29 C.F.R. 1613.704(b).

7. The Employer need not provide any accommodation that would be an undue hardship. An "undue hardship" has been interpreted to mean "undue financial and administrative burdens," or to require "a fundamental alteration in the nature of the program." *School Board of Nassau County*, at 1131. The government has failed to show that continuing Smith's light duty status created an undue hardship.

Assigning Smith work that was within his limitations did not require excessive planning on the part of the supervisors, Smith was a productive worker, was rarely idle, and his light duty status did not unduly impact the work of the other clerks.

In other circumstances it has been found that employment of a distribution clerk with limitations did create an undue hardship. For instance, in *Dexler v. Tisch*, 660 F.Supp. 1418, 1428 (D. Conn. 1987) the court held,

> [O]ne possible accommodation for Mr. Dexler is to not assign him to do various tasks normally assigned to distribution clerks. However, because of the type of operation, such an accommodation would often leave Mr. Dexler without work to do, which would be an undue hardship.

In contrast to the situation in *Dexler*, the operation at the Concord Post Office did not leave Smith without work to do during activities from which he was precluded by his physical limitations.

8. Nonetheless, while Smith was able to perform the essential functions of the distribution clerk position without placing an undue hardship on the post office, he could not perform his duties without risking his own or others' safety. As established above, Smith failed to be completely candid regarding the extent of his back pain with his medical providers. Despite Smith's attempts to conceal his real situation, his supervisors at the post office observed him to be in considerable pain during his eight-hour work shifts.

Smith is an individual for whom physical performance is very important - he appears to have a continuous need to prove himself through physical achievements. In light of Smith's compulsion to engage in physically demanding activities, his under-reporting of pain to his surgeons and medical examiners, and his supervisor's observations of the strain and pain suffered by Smith to perform his job even on light duty, the postmaster's finding that Smith's continued light duty status was a risk to Smith's own health and safety was correct. Accordingly, Helm's decision to terminate Smith on this basis was proper and did not constitute a violation of the Rehabilitation Act. 29 U.S.C. 701.

9. Furthermore, the government is not required to reassign Smith in violation of collective bargaining agreements. *TWA v. Hardison*, 432 U.S. 63, 79-81 (1977). Thus, Postmaster Helm did not violate Smith's rights under the Rehabilitation Act when he did not reassign Smith to a bid position for which Smith was qualified and which he could perform without risking harm to himself or others.

10. Because plaintiff has not prevailed, it is not necessary for this Court to consider issues related to relief such as reinstatement or back pay.

11. Any finding of fact or conclusion of law stated herein which may be considered to be the other is deemed to be such, to the extent appropriate.

III. RECOMMENDATIONS

In consideration of the above findings of facts and conclusions of law this Court hereby recommends to the District Court that judgment be entered on behalf of defendant.

Dated: September 12, 1989

JOAN S. BRENNAN
United States Magistrate

QUESTIONS PRESENTED

1. Whether petitioner received adequate notice of the district court's final judgment when the clerk's office served a copy of that judgment on petitioner's local counsel.

2. Whether Rule 60(b)(1) of the Federal Rules of Civil Procedure applies to neglect that arose during the period covered by Rule 4(a) of the Federal Rules of Appellate Procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1696

JACK C. SMITH, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is unpublished, but the decision is noted at 15 F.3d 1089 (Table). The opinion of the district court (Pet. App. 12a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1994. The petition for a writ of certiorari was filed on April 26, 1994. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed suit against the United States Postal Service, alleging that he had been discharged due to a physical handicap, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Pet. App. 6a. The case was tried before a United States magistrate, who recommended that judgment be entered in favor of the Postal Service. *Ibid.* On July 19, 1991, the district court adopted the magistrate's findings of fact and conclusions of law and entered judgment for the Postal Service. *Ibid.*[1] Notice of the entry of judgment was sent to petitioner's local counsel in San Francisco, but not to his lead counsel in Washington, D.C. *Ibid.*

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provided petitioner with 60 days within which to file a notice of appeal.[2] Under Fed. R. App. P. 4(a)(5), a district court has discretion to grant an extension of time to appeal if a motion is filed not more than 30 days after the notice of appeal is due.[3] Petitioner's right to file a notice of appeal expired in September, 1991, see Pet. App. 7a, and his opportunity to seek an extension of time expired the following month.

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[1] A previous judgment entered against petitioner in this case was reversed by the court of appeals on grounds not relevant here. See *Smith* v. *Frank*, 923 F.2d 139 (9th Cir. 1991).

[2] Rule 4(a)(1) provides in pertinent part:

> [I]n a civil case in which * * * the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after [entry of judgment].

[3] Rule 4(a)(5) provides in relevant part:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

Pursuant to amendments promulgated by this Court, Fed. R. App. P. 4(a)(6) "t[ook] effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending." Amendments to Federal Rules of Appellate Procedure, 500 U.S. 1007, 1009, 1011 (1991). Under Rule 4(a)(6), when a party does not receive notice of a judgment but files a motion seeking an extension of the time to appeal within 180 days after the entry of the judgment, the district court has discretion to reopen the time to appeal for 14 days.[4] 500 U.S. at 1011.

On January 9, 1992, petitioner's lead counsel requested that the district court extend the time to appeal under Rule 4(a)(6); or, in the alternative, that the court vacate and reenter the judgment under Fed. R. Civ. P. 60(b)(1) or (6). Petitioner alleged that, since the court had sent all communications prior to the notice of entry of judgment to both counsel, local counsel had not informed lead counsel of the judgment when he received notice of it. Pet. App. 6a. Petitioner asserted that lead counsel had not learned of the judgment until January 2, 1992, during a conversation with counsel for the Postal Service concerning a related matter. See *id.* at 6a-7a.

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[4] Rule 4(a)(6) reads as follows:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

2. The district court denied the motion. Pet. App. 12a. The court first "question[ed] whether Amended Rule 4(a)(6) is even applicable to this case," noting that the Rule had come into effect on December 1, 1991, after petitioner's right to appeal had expired. *Id.* at 15a. Even if Rule 4(a)(6) did apply, the court held, it would provide no relief to petitioner. Under Rule 4(a)(6), a district court may reopen the time to appeal only when a "party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." Fed. R. App. P. 4(a)(6). In this case, the court observed, petitioner had received notice of the judgment through his local counsel within 21 days and thus was not entitled to relief. Pet. App. 15a-16a.

The district court also denied relief under Fed. R. Civ. P. 60(b)(1), holding that petitioner's failure to file a timely notice of appeal was not due to excusable neglect.[5] The court observed that petitioner's local counsel was notified of the judgment and that "[t]his constitutes sufficient notice to plaintiff." Pet. App. 17a-18a. The court also stated that lead counsel's "failure to inquire with the court or opposing counsel of the status of the case for almost six months * * * does not constitute due diligence." *Id.* at 18a. Finally, the district court

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[5] Rule 60(b) provides in relevant part:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment.

declined to provide relief under Fed. R. Civ. P. 60(b)(6), explaining that petitioner's misplaced reliance on the district court to send a notice of the judgment to lead counsel was not an "extraordinary circumstance" entitling petitioner to relief under that Rule. Pet. App. 18a-19a.

3. The Ninth Circuit affirmed. Pet. App. 6a. Like the district court, the court of appeals found it unnecessary to decide whether Fed. R. App. P. 4(a)(6) should be applied retroactively. It held that petitioner "could not obtain relief even if amended Rule 4(a)(6) applies," explaining that the notice provided to local counsel had sufficiently informed petitioner of the entry of judgment. Pet. App. 8a.

The court also held that relief under the "excusable neglect" standard of Rule 60(b)(1) was not available, since the neglect of petitioner's attorneys occurred during the period covered by Rule 4(a). Pet. App. 9a. Petitioner's local counsel was notified of the judgment on July 23, 1991, five days after the entry of judgment on July 18, 1991, and prior to the expiration of the period for filing a notice of appeal under Rule 4(a)(1) or for requesting an extension of time to appeal under Rule 4(a)(5). Pet. App. 9a. Relief under Rule 60(b)(1), the court stated, is available only in cases where neglect occurs outside the period covered by Rule 4(a), which independently provides relief for "excusable neglect." Pet. App. 9a. This limitation, the court explained, is necessary to protect "the integrity of the deadline imposed by Rule 4(a)." *Ibid.* (citing *Rodgers* v. *Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (en banc)).[6]

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[6] The court also held that relief was not available under Rule 60(b)(6). That provision requires a party to show extraordinary circumstances "suggesting that the party is faultless in the delay."

ARGUMENT

1. a. Petitioner contends that Rule 4(a)(6) revives his right to appeal. Pet. 14-19. The Ninth Circuit correctly concluded, however, that petitioner does not qualify for relief under that Rule. The court of appeals based its holding on the principle that, "[w]here a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment." Pet. App. 8a.[7] The court of appeals also noted that petitioner was required by local rule to designate local counsel upon whom documents could be served, and that this rule "would be of little use to the district court" if the court were "required to communicate with out-of-town counsel to give adequate notice." *Id.* at 8a-9a n.2.

Pet. App. 10a (quoting *Pioneer Inv. Serv. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1497 (1993)). Because the neglect of petitioner's counsel was not a circumstance beyond petitioner's control, he could not qualify for relief under Rule 60(b)(6). Pet. App. 10a. The petition for a writ of certiorari does not contest that aspect of the court of appeals' decision.

[7] Courts of appeals have consistently held that service of a judgment on local counsel constitutes adequate notice to a party, absent otherwise misleading conduct by the district court. See *Lord* v. *Helmandollar*, 348 F.2d 780, 782 (D.C. Cir. 1965) (time for filing notice of appeal not extended when local counsel received notice of judgment but lead counsel did not), cert. denied, 383 U.S. 928 (1966); *Pasquale* v. *Finch*, 418 F.2d 627, 630 (1st Cir. 1969) (same); *Borowski* v. *DePuy, Inc.*, 876 F.2d 1339, 1341 (7th Cir. 1989) (same); *Gooch* v. *Skelly Oil Co.*, 493 F.2d 366, 370 (10th Cir.) (same), cert. denied, 419 U.S. 997 (1974). That rule is consistent with the general principle that "[u]nder our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92 (1990) (internal quotation marks omitted).

Although petitioner admits that he "has been unable to discover any case which decides the same issue under Rule 4(a)(6)," he maintains that two courts of appeals have reached holdings inconsistent with that of the Ninth Circuit in ruling on motions to extend the time to appeal under Rule 4(a)(5) and Rule 60(b). Pet. 15. In fact, the appellate decisions cited by petitioner are inapposite. In *Mennen Co.* v. *Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983), appellant's counsel did not receive notice of the judgment at all. The Second Circuit held that the late notice of appeal was due to "the clerk's failure to abide by [the judge's] precise instructions, not to [the appellant's] own negligence." *Id.* at 570. The court did not discuss the question whether notice to local counsel is sufficient to bind a party. In *Babich* v. *Clower*, 528 F.2d 293 (4th Cir. 1975), the district court issued a final order stating that a copy of the memorandum opinion would be sent to all counsel of record, which included appellants' out-of-state lead counsel. In fact, no copy of the order was sent to lead counsel. *Id.* at 295. The Fourth Circuit held that the appellants' failure to file a timely appeal was "excusable neglect" under Rule 4(a)(5). 528 F.2d at 295. The court explained that "[w]hile Local Rule 7(D) does provide that service on a resident associate of a foreign attorney is equivalent to service on the parties for whom he appears, the language of the court's order was such that the [local] attorney might reasonably have believed that the opinion and order were mailed to appellants' [lead] counsel, who was in charge of the litigation, regardless of the language of the local rule." *Id.* at 295-296. The Fourth Circuit thus emphasized the appellants' reasonable reliance on the statement by the district court—a consideration that is absent in the instant case.

b. Having concluded that petitioner did not qualify for relief under the terms of Rule 4(a)(6), the Ninth Circuit

did not decide whether that Rule should apply retroactively. Petitioner contends (Pet. 19), however, that the Fifth and Tenth Circuits are in conflict on this question and that this Court should grant certiorari to resolve the issue.

The purported circuit conflict provides no basis for this Court's review. In the instant case, the Ninth Circuit determined that Rule 4(a)(6) was inapplicable by its terms to petitioner's claim for relief. The Ninth Circuit did not decide the question of retroactivity, and its judgment would be unaffected by any ruling this Court might issue regarding that question. In addition, no true circuit conflict exists, since the Tenth Circuit decisions cited by petitioner are unpublished opinions having no precedential value.[8] Finally, the question of retroactivity of Rule 4(a)(6) is of no lasting significance, since it affects, at most, only those cases in which judgments were entered during the 180-day period immediately before December 1, 1991, the date Rule 4(a)(6) took effect.[9]

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[8] See *Gamble* v. *United States*, 989 F.2d 507 (10th Cir. 1993) (Table); *Payton* v. *Spruiell*, 951 F.2d 1260 (10th Cir. 1992) (Table). The Tenth Circuit has made clear that its unpublished decisions "are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel." *In re Citation of Unpublished Opinions/Orders and Judgments*, 151 F.R.D. 470 (10th Cir. 1993).

[9] Parties in cases where judgments were entered more than 180 days before December 1, 1991, could not obtain relief under Rule 4(a)(6) even if it were applied retroactively, since the period for seeking relief from judgment under that Rule would have run by the time the Rule took effect. Conversely, Rule 4(a)(6) clearly applies to cases in which the district court entered judgment on or after December 1, 1991, since the Rule "take[s] effect" on that date and "govern[s] all proceedings in appellate cases thereafter com-

2. a. Rule 60(b)(1) of the Federal Rules of Civil Procedure provides a party with an alternative avenue of relief from a final judgment when a party has acted with "excusable neglect." This Rule overlaps to some extent with Fed. R. App. P. 4(a)(5), which permits district courts to extend the time for filing a notice of appeal, based on a showing of "excusable neglect," if a motion is filed not later than 30 days after the deadline imposed by Rule 4(a)(1). Because of this overlap, the court of appeals limited the application of Rule 60(b)(1) to cases where the party's "excusable neglect" arose outside the period for filing an appeal or requesting an extension of time to do so. Pet. App. 9a. Petitioner (through his local counsel) received notice of the judgment five days after it was entered. His neglect "consequently arose prior to the expiration of the period specified in Rule 4(a) both for appeal and for extension of time to appeal," and petitioner was "therefore precluded from relief under Rule 60(b)(1)." Pet. App. 9a-10a. Petitioner claims that the Ninth Circuit's holding is inconsistent with decisions by several other circuits, which have not explicitly adopted the same time limitation on the applicability of Rule 60(b). Pet. 20-23. In fact, no conflict exists: none of the decisions cited by petitioner applied Rule 60(b) in a case where the excusable neglect arose during the period covered by Fed. R. App. P. 4(a).[10] Petitioner acknow-

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menced." Amendments to Federal Rules of Appellate Procedure, 500 U.S. at 1009.

[10] See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808, 809-810 (D.C. Cir. 1974) (per curiam) (Rule 60(b) applied where excusable neglect arose upon notice to counsel ten months after entry of judgment); *Scola* v. *Boat Frances, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980) (original notice of appeal held to be timely); *Mennen Co.* v. *Gillette Co.*, 719 F.2d at 569-570 (appellant granted relief under Fed. R. App. P.

ledges, moreover, that these decisions have applied a "due diligence" standard in ruling on motions under Fed. R. Civ. P. 60(b) to extend the time for appeal. See Pet. 20, 23. In light of the Ninth Circuit's statement that petitioner's lead counsel had failed to exercise due diligence, see Pet. App. 10a n.3, it appears that Rule 60(b) relief would have been denied even under the standard employed in those decisions.

b. The court of appeals also indicated that it was "most unlikely that the neglect of [petitioner's] attorneys could be found 'excusable,'" due to "the fact of actual notice, and the lack of due diligence by lead counsel who failed to inquire for six months." Pet. App. 10a n.3. The court observed that "[e]ven under the somewhat relaxed standard of 'excusable neglect' applied

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4(a)(5) after learning of judgment 43 days after it was entered); *Burkett* v. *Cunningham*, 826 F.2d 1208, 1215-1217 (3d Cir. 1987) (Rule 60(b) applied in case where habeas petitioner in state jail first received notice of final judgment more than two months after it was entered); *Hall* v. *Community Mental Health Center*, 772 F.2d 42 (3d Cir. 1985) (Rule 60(b) relief denied in case where appellant first learned of judgment five months after its entry); *Fidelity Deposit Co.* v. *USAFORM Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975) (Rule 60(b) applied in case where judgment entered 103 days prior to appellant's receiving notice), cert. denied, 425 U.S. 950 (1976); *Smith* v. *Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970) (per curiam) (Rule 60(b) applied in case where appellant in private action learned of judgment 63 days after its entry); *Spika* v. *Village of Lombard*, 763 F.2d 282, 285 (7th Cir. 1985) (Rule 60(b) relief denied where appellant learned of judgment five months after it was entered), cert. denied, 474 U.S. 1056 (1986); *Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam) (Rule 60(b) relief denied where appellant learned of judgment more than one year after its entry); *Harnish* v. *Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986) (Rule 60(b) applied in case where parties notified more than three months after entry of judgment).

by the Supreme Court in a bankruptcy context, a finding of excusable neglect was affirmed primarily because of a deficiency in the notice given to counsel." *Ibid.* (citing *Pioneer Investment Services Co.* v. *Brunswick Assocs., Ltd. Partnership*, 113 S. Ct. 1489, 1498 (1993)). Petitioner contends (Pet. 24-25) that the court of appeals' reference to "due diligence" reflects a misunderstanding of this Court's decision in *Pioneer*, which discussed the "excusable neglect" standard of Rule 60(b)(1) in the course of its analysis of Bankruptcy Rule 9006(b)(1). See 113 S. Ct. at 1497.[11]

This aspect of the court of appeals' analysis was unnecessary to the court's disposition of the case. In any event, the Ninth Circuit's reference to "due diligence" is wholly consistent with this Court's holding in *Pioneer* that "excusable neglect" includes "negligence." See 113 S. Ct. at 1497. By examining whether petitioner had been diligent in learning of the judgment, the Ninth Circuit was not requiring blameless conduct by petitioner or his attorneys. Rather, the court simply pointed out that the degree of counsel's negligence was "unlikely" to be deemed excusable, given that local counsel received actual notice of the final judgment and that lead counsel failed to make any inquiry about the case for almost six months. Pet. App. 10a. This Court's holding in *Pioneer*, a case which involved faulty notice and a mere 20-day delay, see 113 S. Ct. at 1493, 1499-1500, does not suggest a contrary result.

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[11] Petitioner acknowledges, however, that prior decisions permitting Rule 60(b) motions to extend the time for filing a notice of appeal have imposed a due diligence requirement. See Pet. 20, 22 n.9, 23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1994

JACK C. SMITH,

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MARVIN T. RUNYON, POSTMASTER GENERAL

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AS TO WHETHER NOTICE TO LOCAL COUNSEL IS IMPUTABLE TO LEAD COUNSEL WHEN LOCAL COUNSEL FAILS TO COMMUNICATE THE NOTICE

In its brief in opposition, respondent attempts to establish that there is no conflict among the circuits as to whether notice to local counsel is imputable to lead counsel by distinguishing cases which held that notice to local counsel need not be imputed to lead counsel. Brief for the Respondent in Opposition ("Resp. Br."), pp. 6-7.

Respondent contends that *Babich v. Clower*, 528 F.2d 293 (4th Cir. 1975), is distinguishable, because the "Fourth Circuit * * * emphasized the appellant's reasonable reliance on the statement by the district court" that a copy of the opinion would be sent to all counsel of record and accordingly local counsel did not independently notify lead counsel of the order. Resp. Br. 7. This case is extremely similar. Here, the district court had established a uniform practice, through the mailing of 29 different documents from 1987 through 1991, of sending all communications to primary counsel as well as to local counsel. Petition for a Writ of Certiorari ("Pet."), pp. 6-7 and n. 4. Thus, local counsel relied on a pattern of behavior established by the court over a four-year period. Moreover, the docket entry for the judgment in this case contains the notation "(cc: all counsel)." Docket entry 191 (contained in the Excerpts of Record submitted to the appellate court). Just as in *Babich*, the court intended a copy of the order to be directly sent to lead counsel. Just as in *Babich*, local counsel "might reasonably have believed that the opinion and order were mailed to appellant's Washington counsel, who was in charge of the litigation, regardless of the language of the local rule."[1] 528 F.2d at 296. Thus, the Ninth Circuit's

---

[1] Respondent also attempts to distinguish *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983), by pointing out that in that case none of appellant's counsel received notice of the judgment. Respondent continues by asserting that "[t]he court did not discuss the question whether notice to local counsel is sufficient." Resp. Br. 7. However, the court of appeals in *Mennen* cited *Babich* as "particularly apposite" and described the circumstances of the *Babich* case in support of its own decision to extend the time to file a notice of appeal. 719 F.2d at 570.

determination is directly inconsistent with the Fourth Circuit's holding in *Babich v. Clower*.

Respondent concedes that "service of a judgment on local counsel constitutes notice to a party, absent otherwise misleading conduct by the district court." Resp. Br. 6, n. 7. Respondent then cites four cases for this proposition. This proposition is directly inconsistent with the determination below. The district court's failure to follow its uniform practice of sending papers to both lead and local counsel misled petitioner's counsel. Thus, the decision below is inconsistent with *Babich v. Clower* and respondent's own view of well-established law.

II. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF OTHER CIRCUITS AS TO THE APPLICABILITY OF RULE 60(b)(1) IN CASES WHERE IT IS INVOKED TO EXTEND THE TIME FOR APPEAL

Respondent argues that there is no conflict among the circuits over whether Rule 60(b)(1) of the Federal Rules of Civil Procedure may be applied in cases where a party's excusable neglect arose either during the period for appeal allowed by Rule 4(a)(1) or the 30-day period for filing a motion to extend the time for filing an appeal allowed by Rule 4(a)(5) of the Federal Rules of Appellate Procedure, because none of the cases cited in the petition apply Rule 60(b)(1) in such a case. Resp. Br. 9. Respondent draws too fine a line. The Ninth Circuit divided the cases into two categories, cases where the excusable neglect first arose before expiration of the 30-day period for extending time to appeal under Rule 4(a)(5) and cases where the excusable neglect arose after that period. The 10 cases cited in note 9 of the petition (Pet. 22) involved situations when the

excusable neglect arose after the 30-day period of Rule 4(a)(5). However, none of these cases imposed any requirement concerning when the excusable neglect arose. None of the courts limited their holdings to apply only to cases in which excusable neglect arose after the 30-day period of Rule 4(a)(5).

Thus, each of the cases sets forth a standard for relief under Rule 60(b)(1) which is inconsistent with that of the Ninth Circuit.

III. THE DECISION BELOW CONFLICTS WITH THE DETERMINATION OF THIS COURT IN *PIONEER* AS TO THE MEANING OF "EXCUSABLE NEGLECT"

Respondent attempts to characterize the decision of the Ninth Circuit as consistent with this Court's holding in *Pioneer Investment Services Co. v. Brunswick Assocs., Ltd. Partnership*, 113 S. Ct. 1489, 1495, 1497 (1993), that excusable neglect includes attorney carelessness, inadvertence, and negligence. Resp. Br. 11. Respondent tries to distinguish the facts of *Pioneer* by arguing that counsel's negligence in this case was much more extreme than the negligence excused in *Pioneer*. Resp. Br. 11.

Respondent's attempt to distinguish *Pioneer* does not address the main problem with its position: that this Court set forth a standard in *Pioneer* which is inconsistent with the due diligence standard of *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). See Pet. 25-26. Since the court below used the legal standard rejected by the *Pioneer* decision, this case should be remanded for a finding as to whether counsel's neglect was in fact excusable.

The facts of this case make clear that counsel's neglect was excusable under the criteria of *Pioneer*. Echoing the court of appeals, respondent argues that since the attorneys in *Pioneer* missed the deadline for filing by 20 days rather than 6 months, they were less negligent. Resp. Br. 11; Pet. App. 10a, n. 3. This claim does not withstand examination. In *Pioneer*, lead counsel admitted receiving actual notice of the bar date for filing a proof of claim in a bankruptcy proceeding. 113 S. Ct. at 1492. Nevertheless, the lead counsel missed the deadline. *Ibid.* In contrast, in this case, lead counsel did not receive actual notice of the judgment. Moreover, as is discussed above, lead counsel and local counsel relied on the established practice of the district court to mail lead counsel all orders of the court.

Respondent's distinction between a delay of 20 days and 6 months is irrelevant. The cases cited by respondent itself (Resp. Br. 9, n. 10) make clear that Rule 60(b) relief is available for delays of similar or even longer lengths. See *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 500 F.2d 808, 809-810 (D.C. Cir. 1974) (per curiam) (11-month delay); *Fidelity Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 748 (5th Cir. 1975) (109-day delay); *Buckeye Cellulose Corp. v. Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam) (delay of over one year);[2] *Harnish v. Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986) (3-month delay). Hence, the 6-month delay in this case is no bar to Rule 60(b) relief.

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[2] Respondent erroneously states that relief was denied in *Buckeye*. Resp. Br. 9, n. 10. In fact, the court granted Rule 60(b) relief.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL BRIEF

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Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 15.7 of the Supreme Court, petitioner hereby files this supplemental brief to bring to the attention of the Court the recent decision of the Court of Appeals for the Second Circuit in *Avolio v. County of Suffolk*, No. 93-7649, July 6, 1994 (attached hereto as Pet. App. B). This decision, of which petitioner was not aware when he filed Petitioner's Reply Brief, presents a conflict between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Second Circuit.

This case involves, inter alia, the issue whether Rule 4(a)(6) of the Federal Rules of Appellate Procedure may be applied when plaintiff's local counsel has received notice of entry of judgment within 21 days, although plaintiff's lead counsel, who was the sole counsel involved in handling the case, did not receive notice. As petitioners set forth in the Petition for a Writ of Certiorari, the Court of Appeals for

the Ninth Circuit relied on *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986), in holding that notice to local counsel "sufficiently informs a party of an entry of judgment," for the purposes of Rule 4(a)(6). Pet. 14-15; Pet. App. A, p. 8a. The *Alaska Limestone* case, in turn, was based on an interpretation of the phrase "excusable neglect," as it appears in Rule 4(a)(5). 799 F.2d at 1411-1412; Pet. 15, n. 6. In effect, the Ninth Circuit ruled that Rule 4(a)(6) did not apply to plaintiff, because the failure of plaintiff's lead counsel to receive actual notice of entry of judgment within the 21 days required by Rule 4(a)(6) was not attributable to "excusable neglect" under Rule 4(a)(5) as interpreted by the court in *Alaska Limestone*.

Avolio v. County of Suffolk squarely conflicts with the decision below. The Court of Appeals for the Second Circuit held that, under Rule 4(a)(6), "a denial of relief may not be based on a concept of inexcusable neglect for not having learned of the entry of judgment. That concept has no place in the application of subdivision (6)." Pet. App. B, p. 7b.

In *Avolio*, the court clerk entered judgment against plaintiffs on February 4, 1993. Plaintiffs' counsel stated that he did not learn of the entry of judgment until March 18, 1993. On March 26, 1993, plaintiffs' counsel filed a Rule 4(a)(6) motion for extension of the time to file an appeal. Pet. App. B, pp. 1b-2b.

The district court denied the motion. While it assumed that plaintiffs' counsel had not received actual notice of entry of judgment, the court then relied on the law as it existed before the 1991 amendment to the Federal Rules of Appellate Procedure that created Rule 4(a)(6) to determine whether it should exercise its discretion to grant the motion. Pet. App. B, p. 3b. Under that law, "[i]n the second circuit, the clerk's failure to mail a notice of judgment did not

constitute excusable neglect." *Ibid.* Instead, a party was obligated to find out when a judgment was entered. *Ibid.*

The Second Circuit reversed the district court. As the Second Circuit pointed out, the district court's analysis may have been correct under Rule 4(a)(5),[1] but "[s]ubdivision (6) of rule 4(a) * * * was added in 1991 to address precisely the type of problem presented by this case." Pet. App. B, p. 4b. "The purpose of subdivision (6) was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment." *Id.*, p. 6b. Hence, to apply the "excusable neglect" standard would be to "subvert the central purpose of subdivision (6)." *Ibid.* Accordingly, denial of Rule 4(a)(6) relief "may not be based on a concept of inexcusable neglect for not having learned of the entry of judgment. That concept has no place in the application of subdivision (6)." *Id.*, p. 7b.

In sum, the Second Circuit held in the *Avolio* case that denial of Rule 4(a)(6) relief may not be based on the notion of inexcusable neglect. In contrast, the Ninth Circuit held below that notice to local counsel is imputable to lead counsel under Rule 4(a)(6) based on the principle of "inexcusable neglect" taken from the *Alaska Limestone* case. Thus, the Ninth Circuit would import a rigid standard of "excusable neglect" into a rule, Rule 4(a)(6), which was intended precisely to allow appellants an alternative to meeting the "excusable neglect" standard. This ruling, coupled with the Ninth Circuit's rigid interpretation of "excusable neglect," in conflict with this Court's ruling in

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[1] The Second Circuit did not discuss how "excusable neglect" should be interpreted in light of this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993).

Pioneer (see *id.*, pp. 23-27), would create an especially strict standard of diligence for foreign counsel. This is an issue of substantial importance since the courts continue to deal frequently with the question when cases may be appealed after the ordinary period for appeal had run due to deficiencies in the notification of counsel of the judgment. Accordingly, a conflict exists between the two circuits on an issue of substantial importance.

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APPENDIX

___ F.3d ___, 63 USLW 2051 (Cite as: 1994 WL 324561 (2nd Cir.(N.Y.))

John AVOLIO, Gary A. Abbate, and Silvio Abbate,
Plaintiffs-Appellants,

v.

COUNTY OF SUFFOLK, Suffolk County Police Department; Detectives Joseph Avella and Angelo Carrion; and Detective Sergeant Donald Risener,
Defendants-Appellees.

Nos. 691, 93-7649.
United States Court of Appeals, Second Circuit July 6, 1994.

FEINBERG, PRATT, and MINER, Circuit Judges.

PRATT *1 This appeal requires us to interpret and apply, apparently for the first time in this circuit, a 1991 amendment to rule 4(a) of the Federal Rules of Appellate Procedure. The amendment extends until 180 days after entry of judgment the time within which a district court may permit late filing of a notice of appeal.

Plaintiffs's 1983 action against Suffolk County, New York, the Suffolk County Police Department, Suffolk County Detectives Joseph Avella and Angelo Carrion, and Detective Sergeant Donald Risener was dismissed, partly as a matter of law during trial, and partly by a jury verdict. On February 4, 1993, the clerk entered judgment against the plaintiffs and, as required by Fed.R.Civ.P. 77(d), mailed notice of entry of the judgment to all parties.

In his affirmation supporting plaintiffs' motion for an extension of time to appeal, counsel for plaintiffs indicated that his office had never received a copy of the judgment. His affirmation implies that he first learned the judgment had been entered when on or soon after March 18, 1993, his

client told him that he had contacted the court and was advised that a judgment had been signed on January 19, 1993. Counsel confirmed that information by telephone in a conversation with a deputy clerk and immediately obtained a copy of the judgment. Counsel further asserted that he could "conceive of no prejudice to any of the defending parties to this action" resulting from an extension of time to appeal.

On March 26, 1993, plaintiffs' attorney moved "pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure to reopen the time for plaintiffs to file a Notice of Appeal". Counsel for defendant Risener, by letter dated April 8, 1993, "vigorously oppose[d]" the motion "[i]n view of the complete lack of merit in Plaintiff's [sic] case". The other defendants raised no opposition.

By memorandum and order dated June 9, 1993, the district court denied the motion. Despite the facts that the clerk's office had mailed copies of the judgment to all parties and that none of the copies was returned, the court assumed for purposes of the motion that plaintiffs' attorney never received a copy of the judgment. Thus, the court turned to rule 4(a)(6), as amended in 1991. That rule reads as follows:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

The district court construed the word "may" as allowing it discretion to determine whether under the circumstances an extension should be granted, and it found that the circumstances "do not warrant such an extension". To guide its discretion the district court turned to the law as it existed before the 1991 amendment. Under that law, during a period of 30 days after the time to file a notice of appeal has expired, the district court could grant an extension only upon a showing of excusable neglect. In the second circuit, the clerk's failure to mail a notice of judgment did not constitute excusable neglect. Bortugno v. Metro-North Commuter Railroad, 905 F.2d 674, 676 (2d Cir.1990) (per curiam) (reversing district court's grant of extension). As pointed out by the district court, a party was obligated to find out when the judgment was entered, and counsel's failure to investigate when he did not receive notice of a judgment from the clerk, constitutes "unexcusable neglect and does not warrant an extension of time in which to file a notice of appeal." *2 In short, the district court interpreted the word "may" in the 1991 amendment to have incorporated into Fed. R.App. P. 4(a)(6) the same standard of excusable neglect that had guided our earlier rulings on motions for extensions of time to appeal.

We do not think the district court's decision correctly reflects either the purpose or effect of rule 4 as now amended. As pointed out in the notes of the advisory committee that accompanied the 1991 amendment,

> The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to

impair the opportunity to file a timely notice of appeal.

* * *

This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal.

In a civil case not involving the United States, a notice of appeal must be filed within 30 days after the date of entry of the judgment or order appealed from, Fed. R.App. P. 4(a)(1), unless the time is extended under one of the other subdivisions of rule 4(a). Under subdivision (5), the district court may extend the time upon a motion filed not later than 30 days after expiration of the original period, provided there is "a showing of excusable neglect or good cause". Plaintiffs could not qualify for this kind of extension because the mere failure to discover that the judgment had been entered, even when the clerk had failed to mail a notice of judgment as directed by Fed.R.Civ.P. 77(d), does not constitute excusable neglect. Bortugno, 905 F.2d at 676.

Subdivision (6) of rule 4(a), however, was added in 1991 to address precisely the type of problem presented by this case. It authorizes an extension of time when the appellant did not receive notice of the entry of the judgment or order within 21 days of its entry.

To qualify under subdivision (6), the movant must establish: (1) that he was entitled to notice of the entry of the judgment; (2) that he did not receive such notice from the clerk or any party within 21 days of its entry; (3) that no party would be prejudiced by the extension; and (4) that he

moved within 180 days of entry of the judgment or within 7 days of his receipt of such notice, whichever is earlier.

Plaintiffs in this case claimed to have met these requirements. As to the first, there is no dispute that plaintiffs were entitled to notice of the entry of the judgment against them. As to the second--whether plaintiffs received such notice--there appears to be no problem, although the district court may wish to inquire further on the remand that we are ordering. Counsel's affirmation in support of the motion for an extension of time, as well as the district court's decision, both speak in terms of receipt of a copy of the judgment; the rule contemplates receipt of notice of the entry of the judgment. Whether the difference is significant or not in this case, we leave to the district court to determine.

*3 In other respects, although the record lacks clarity, non-receipt of the notice seems to have been established. The moving papers reflect that while plaintiffs' counsel was out of the state for an 8-day period in March, one of the plaintiffs contacted the court and was advised that the judgment had been signed on January 19, 1993. Since plaintiffs were then represented by counsel, the notice of entry had to be received by counsel, not the party. See Fed.R.Civ.P. 5(b) ("[W]henever * * * service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney."). Furthermore, the notice must be received "from the clerk or any party". Finally, the notice contemplated by this rule is written notice; an oral communication simply is not sufficient to trigger the relevant time periods. In short, it appears at least until March 18, no notice was received by plaintiffs within the meaning of subdivision (6).

As to the third requirement--prejudice--the district court did not reach the question. Plaintiffs' counsel argued that no prejudice would follow in the circumstances here, and none of the defendants urged the district court to find prejudice. Nevertheless, a finding on this point by the district court will be required before the extension may be granted.

As to the fourth requirement--timeliness--counsel's affirmation asserts that after he returned to New York on March 18, 1993, he obtained a copy of the judgment from the clerk. Presumably at that point he did receive from the clerk the required written notice that the judgment had been entered. His motion under subdivision (6), filed on March 26, 1993, was well within 180 days of the entry of judgment. It was also within the required seven days, since the intervening Saturday and Sunday are excluded from the calculation. Fed.R.Civ.P. 6(a). Plaintiffs' motion was therefore timely.

The district court did not reach some of these issues, because it interpreted the word "may" as granting to the district court discretion in deciding whether or not to grant the motion. To guide its exercise of discretion, the district court then incorporated into subdivision (6) the standard of "excusable neglect" that applies to applications for extensions of time under subdivision (5). This was error. The purpose of subdivision (6) was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment.

Were we to accept the district court's interpretation, we would subvert the central purpose of subdivision (6). As noted by the civil rules advisory committee in recommending a companion amendment to Fed.R.Civ.P. 77(d), "The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of

appeal are filed late because of their failure to receive notice of entry of a judgment."Advisory Committee Note to 1991 amendment of Fed.R.Civ.P. 77(d).

*4 To balance the potentially substantial extension of the time to appeal, subdivision (6) in effect encourages the prevailing party to send its own notice of entry of judgment to the losing party. See David D. Siegel, Changes in Federal Rules of Civil Procedure, 142 F.R.D. 359, 378 (1992). As noted by the Advisory Committee, "Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. "Advisory Committee Note to Fed. R.App. P. 4(a)(6).

In sum, if a party does not receive notice of entry from the clerk or another party within 21 days of entry of the judgment, he may seek an extension of time under subdivision (6) at any time up to 180 days after entry of the judgment, provided he moves within 7 days of receipt of notice of entry; and he may succeed if he can establish that no party would be prejudiced by the delay. We need not determine to what extent discretion may lie in the district court under this rule; we do determine, however, that a denial of relief may not be based on a concept of inexcusable neglect for not having learned of the entry of judgment. That concept has no place in the application of subdivision (6).

We therefore vacate the order of the district court and remand for further proceedings with respect to plaintiffs' motion consistent with this opinion.